United States Court of Appeals

for the Second Circuit

APPENDIX

76-6114
76-6119

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-6114
76-6119

B

CHIN LAU,
Plaintiff-Appellee-Cross-Appellant,

—v.—

MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice,
Defendant-Appellant-Cross-Appellee.

UNITED STATES COURT OF APPEALS
FILED
MAR 14 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the Defendant-Appellant-Cross-Appellee.

THOMAS H. BELOTE,
ROBERT S. GROBAN,
Special Assistant United States Attorneys, Of Counsel.

PAGINATION AS IN ORIGINAL COPY

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Relevant Docket Entries

Date	*Proceeding*
3/13/75	Filed Complaint and issued Summons.
6/ 3 /75	Filed answer to complaint.
12/11/75	Filed Defendant's motion for summary judgment.
12/11/75	Filed Plaintiff's cross motion for summary judgment.
1/ 5 /76	Filed Defendant's Reply Brief. Filed Plaintiff's Reply Brief.
3/25/76	Filed Opinion #44118 . . . Plaintiff's motion for summary judgment granted and matter remanded—McMahon, J.
5/24/76	Filed judgment and order in favor of plaintiff.
7/23/76	Filed Defendant's notice of appeal.
8/ 2 /76	Filed Plaintiff's notice of cross-appeal.

SUMMONS IN A CIVIL ACTION A 1 CIV. 1 (3-44) (Formerly D. C. Form No. 23 Rev. (6-49))

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO.

CHIN LAU,

75 CIV 1237
JUDGE MACMAHON

Plaintiff

v.

SUMMONS

MAURICE P. KILEY, DISTRICT DIRECTOR OF THE NEW YORK DISTRICT, IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,

Defendant

Time was due
May 13-1975
filed

To the above named Defendant :

You are hereby summoned and required to serve upon EDWARD J. LEVITZ and BENJAMIN GIM

plaintiff's attorney, whose address 8 West 40th Street, New York, New York and 217 Park Row, New York, New York, respectively,

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

RAYMOND F. BURGHARDT *Clerk of Court.*

~~G. HARRISON~~ F.P. CASTELLANO *Deputy Clerk.*

Date: 5/13/75.

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

A 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHIN LAU,

Plaintiff

vs.

MAURICE P. KILEY, DISTRICT DIRECTOR OF THE NEW YORK DISTRICT, IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,

Defendant

COMPLAINT

CIV. NO. 75 Civ 1237

The plaintiff through his attorneys, EDWARD J. DENNIS and BENJAMIN GIM, alleges:

1. Plaintiff is an alien permanently admitted to the United States for permanent residence and is a resident of the County, State and Southern District of New York.

2. Defendant is the District Director of the New York District of the United States Immigration and Naturalization Service, authorized by law and regulations of the Attorney General of the United States and the Commissioner of the Immigration and Naturalization Service to consider and grant or deny petitions filed by permanent resident aliens pursuant to Section 204 of the Immigration and Nationality Act of 1952 for preference status for alien unmarried sons and daughters pursuant to Section 203(a)(2) seeking to emigrate to the United States.

3. Pursuant to 28 U.S. Code Section 1331 this Court has original jurisdiction of this civil action wherein the matter and controversy exceed the sum of value of $10,000.00, exclusive of interest and costs, and the action arises under the

United States Constitution and Laws of the United States and particularly the due process clause of the Fifth Amendment of the Constitution and Sections 101(b)(1)(C) and (D), 203(a)(2) and 204 of the Immigration and Nationality Act (8 U.S.C. Sections 1101(b)(1)(C) and (D); 1153(a)(2); 1154(a)) and the Administrative Procedures Act (5 U.S.C. 701 et. seq.).

4. Plaintiff, CHIN LAU, is a 47 year old native of the People's Republic of China, who first entered the United States as a lawful immigrant in 1966 and he is a lawful permanent resident of the United States. In 1973 he married in New York City and is presently married to Rose Cheung Lau, a permanent resident alien. This is plaintiff's first and only marriage and there are no children of this marriage.

5. Beginning in 1947 in China plaintiff cohabited with for a number of years but did not marry Chin Dung You. They have two children, a daughter, Yee Sheung Lau, born in China on October 29, 1948, and a son, Kim Kok Lau, born in China on June 16, 1952. Both children continue to live with plaintiff's mother in China. Since their birth plaintiff has acknowledged his paternity of his said daughter and son and has paid for their care, maintenance and support.

6. On September 12, 1973 plaintiff filed a petition with defendant pursuant to Section 204 of the Immigration and Nationality Act and 8 C.F.R. part 204, the applicable regulations, for preference status for his son, Kim Kok Lau, pursuant to Section 203(a)(2) of the Act, preparatory to the son's emigration to the United States to join the plaintiff, his father.

7. China is and was a country which maintained no statistical bureaus to issue birth certificates and consequently such documents are impossible to obtain. Plaintiff therefore submitted to defendant plaintiff's affidavit and affidavits of his first cousin and of a woman from a neighboring village to the village where plaintiff's children and his family live, both affiants having known plaintiff since he was a child, setting forth their first hand knowledge that Kim Kok Lau is plaintiff's son and is known throughout plaintiff's village as his son. In support of plaintiff's petition, plaintiff also submitted letters from his son, Kim Kok Lau, to plaintiff acknowledging receipt of money from plaintiff to his said son for care, maintenance and support, together with a family picture of plaintiff, his 2 children, and Chin Dung You, taken in China in 1954, prior to plaintiff's emigration to this country in 1966.

8. Plaintiff in support of his petition also submitted to defendant a letter dated July 5, 1973, to plaintiff's attorney from Mya Saw Shin, Senior Legal Specialist, Law Library Far Eastern Law Division of the Library of Congress (Exhibit 1 annexed to this complaint), setting forth an English translation of Article 15 of the Marriage Law of the People's Republic of China promulgated on May 1, 1950 and stating the letter writer's legal opinion that in China "all illegitimate children /have/ the same legal status as legitimate children".

9. On February 28, 1974, defendant rendered a decision and order denying plaintiff's petition for his son (Exhibit 2 annexed) on the grounds that the son was illegitimate

at birth and that no evidence had been submitted that the son "has been legitimated".

10. On plaintiff's appeal from the defendant's order and decision pursuant to 8 C.F.R. Section 3.1(b)(5), the Board of Immigration Appeals of the U.S. Department of Justice on October 23, 1974 rendered a decision and opinion (Exhibit 3 annexed): (1) that there was no evidence in the record that paternity "has been legally established in compliance with Article 15 of the Marriage Law of the People's Republic of China"; (2) that the Board could not construe the statute, Section 101 (b)(1)(D) of the Act which expressly includes within the definition of "child" an illegitimate child claiming a benefit through"its natural mother", as including an illegitimate child claiming a benefit through its natural father; and (3) that the Board lacked authority to hold the statute unconstitutional as denying equal protection and due process of law to natural fathers and their children.

11. Both defendant and the Board of Immigration Appeals refused to consider plaintiff's uncontroverted evidence that Kim Kok Lau is his son on the ground that the statutory provision, Section 101(b)(1)(D) of the Act, extends immigration privileges only to illegitimate children of mother petitioners, and not to illegitimate children of father petitioners such as the plaintiff.

12. Under the said Article 15 of the Marriage Law of the People's Republic of China, children born out of wedlock in China, including plaintiff's son, Kim Kok Lau, have the same rights and legal status as children born in lawful wedlock and are children legitimated under the law of the children's residence or

domicile within the meaning of Section 101(b)(1)(C) of the Immigration and Nationality Act of 1952, as amended.

13. The classification of an illegitimate child in Section 101(b)(1)(D) of the Act so as to confer immigration privileges to one seeking a benefit through its natural mother and excluding a child seeking such a benefit through its natural father is arbitrary and capricious and enacted without an overriding public necessity justifying such discrimination, and an unconstitutional denial of equal protection and due process of law to the natural father prohibited by the Fifth Amendment of the U.S. Constitution. The natural father, including plaintiff, is entitled to consideration and grant of this petition under Section 203 and 204 of the Act in the same manner as a natural mother in the same situation.

14. The refusal by the defendant and the Board of Immigration Appeals to consider the plaintiff's ample, uncontroverted evidence of his fatherhood of his son, Kim Kok Lau, and to make a determination of fact of the claimed relationship of father and son constituted a denial of due process of law and the unconstitutional assertion of a conclusive and irrebutable presumption of law against plaintiff that Kim Kok Lau is not his son.

WHEREFORE, plaintiff prays for a Judgment of this Court:

1. That the defendant and Board of Immigration Appeals erred as a matter of law in holding that plaintiff's son was not legitimated within the meaning of Section 101(b)(1)(C) of the Immigration and Nationality Act.

2. That Section 101(b)(1)(D) of the Act denies plaintiff equal protection and due process of law in violation of the Fifth Amendment of the U.S. Constitution and plaintiff is entitled to have his petition on behalf of his son granted in the same manner as the petition of a natural mother of an illegitimate son.

3. That refusal of the defendant and Board of Immigration Appeals to consider plaintiff's uncontroverted evidence of his paternal relationship to his son, Kim Kok Lau, and make a determination of fact of the claimed relationship constituted a denial of due process of law and the unconstitutional assertion of a conclusive irrebutable presumption against plaintiff that Kim Kok Lau is not his son and that defendant be directed to consider the evidence and make a factual determination thereon.

4. That such other and further relief be granted as the Court deems just in the premises.

Edward J Ennis

EDWARD J. ENNIS
8 West 40th Street
New York, New York

BENJAMIN GIM
217 Park Row
New York, New York

Attorneys for Plaintiff

A 8

THE LIBRARY OF CONGRESS

WASHINGTON, D.C. 20540

Law Library
Far Eastern Law Division

JULY 05 1973

Dear Mr. Gim:

Your letter to Senator Frank Moss regarding the legal status of an illegitimate child born in mainland China in 1951 has been referred to the Law Library for attention and reply.

The first part of your inquiry relates to the position of an illegitimate child under the law of the People's Republic of China. The Marriage Law of the People's Republic of China, promulgated by the Central People's Government on May 1, 1950, contains only one article on this subject. This is the same article cited by Meijer, whom you mention in your letter, and the article in its entirety reads as follows:

> Article 15. Children born out of wedlock shall enjoy the same rights as children born in lawful wedlock. No person shall be allowed to harm or to discriminate against them.
>
> Where the paternity of a child born out of wedlock is legally established by the mother of the child or by other witnesses or by other material evidence, the identified father must bear the whole or part of the cost of maintenance and education of the child until the age of 18.
>
> With the consent of the mother, the natural father may have the custody of the child.
>
> With regard to the maintenance of a child born out of wedlock, in case its mother marries, the provisions of Article 22 shall apply.

This law makes no distinction between the simple illegitimate child and the adulterously illegitimate child, all illegitimate children having the same legal status as legitimate children.

EXHIBIT 1

With regard to the position of an illegitimate child under Chinese customary law as recognized in Hong Kong, there a distinction is made between the child of a [illegible] or secondary wife (sometimes called concubine), and the child born of illicit intercourse, that is to say, with a woman not forming part of the father's household.

The Taing Code, upon which Chinese customary law is based, considers as being legitimate children all sons, whether born of the principal wife or of a concubine, and allows them equal rights of inheritance and succession. Only children born of illicit intercourse are termed illegitimate children, and are entitled to a half-share only of the family property. If no legal successor exists the Code allows such illegitimate children to succeed and to receive the whole patrimony.

C. Jamieson, in his Chinese Family and Commercial Law, first published in Shanghai in 1921, states that for illegitimate children to have these rights, they must have been acknowledged by the father, and that the father must also have taken the responsibility for the upbringing of the children. This is confirmed by certain [illegible] that have been made on the subject and which were reported by the Committee on Chinese Law and Custom in Hong Kong in their Report, published in Hong Kong in 1953.

The same Committee adds the following note on the status of Chinese customary law:

> So, although acknowledgment of an illegitimate son is not expressly provided for in the law, yet [illegible] a son may succeed to property, [illegible] laid down [illegible] would be proper to hold, according to principles of law, that acknowledgment shall establish the [illegible]. Upon the acknowledgment by the father, [illegible] illegitimate son, the relation between father and [illegible] established.

I hope this information will be of assistance.

Sincerely yours,

Mya [illegible]
Senior Legal Specialist

Enclosure

Mr. Benjamin Gim
Counselor at Law
217 Park Row
New York, New York 10038

EXHIBIT 1

BEST COPY AVAILABLE

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
20 West Broadway
New York, New York 10007

A 10

REFER TO THIS FILE NO.
A20 122 881

Chin Lau
41 Jefferson Street, Apt. 15
Brooklyn, New York 11206

Date: FEB 28 1974

DECISION

Upon consideration, it is ordered that your visa petition filed in behalf of Kin Kok Lau be denied for the following reasons:

See attached sheet

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed within 15 days from the date of this notice. If no appeal is filed within the time allowed, this decision is final. Appeal in your case may be made to:

☒ Board of Immigration Appeals in Washington, D. C., on the enclosed Forms I-290 A.

☐ Regional Commissioner on the enclosed Form I-290 B.

If an appeal is desired, the Notice of Appeal shall be executed and filed with this office, together with a fee of $25. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any question which you may have will be answered by the local immigration office nearest your residence, or at the address shown in the heading to this letter.

cc: Benjamin Gim, Esq.
217 Park Row
New York, New York 10038

Sincerely yours,

Sol Marks
District Director

Enclosure(s)

Form I-292
(Rev 9-1-69)

EXHIBIT 2

Section 101(b)(1) of the Immigration and Nationality Act provides that any relationship of a child through a father must be as a result of a valid marriage and the child must be legitimate or have been legitimated before the child reaches the age of eighteen years.

The facts presented disclose that the beneficiary was illegitimate at birth and that you never married the mother of the beneficiary. In addition, no evidence has been presented to establish that the beneficiary has been legitimated.

In view of the foregoing, the beneficiary is not entitled to any status on the basis of your visa petition.

EXHIBIT 2

A 12

United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

File: A20 122 881 - New York

OCT 23 1974

In re: KIN KOK LAU, Beneficiary of visa petition filed by CHIN LAU, Petitioner

IN VISA PETITION PROCEEDINGS

APPEAL

ON BEHALF OF PETITIONER: Benjamin Gim, Esq.
217 Park Row
New York, New York 10038

ON BEHALF OF I&N SERVICE: David L. Milhollan
Appellate Trial Attorney

ORAL ARGUMENT: June 18, 1974

APPLICATION: Petition to classify status of alien relative for issuance of immigrant visa

The lawful permanent resident petitioner applied for preference status for the beneficiary as his unmarried son under section 203(a)(2) of the Immigration and Nationality Act. In a decision dated February 28, 1974, the District Director denied the petition on the ground that the beneficiary was not the legitimate or legitimated son of the petitioner. The petitioner has appealed from that decision. The appeal will be dismissed.

The petitioner is a male who is a native and citizen of China. The beneficiary was allegedly born in 1952, in the People's Republic of China, as the result of a relationship between the petitioner and Chin Dung You. The petitioner never married Chin Dung You.

EXHIBIT 3

In order to qualify as a "son" for preference purposes, a beneficiary must once have qualified as a "child" of the petitioner under section 101(b)(1) of the Act. Matter of Coker, Interim Decision 2255 (BIA 1974). The applicable portions of section 101(b)(1) define a "child" as the legitimate child, or a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, if such legitimation takes place before the child reaches the age of 18 years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation. The burden of establishing the existence of the required relationship rests upon the petitioner. Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966).

Counsel claims that the beneficiary is the petitioner's legitimate child under the provisions of Article 15 of the Marriage Law of the People's Republic of China, promulgated May 1, 1950, which states:

> Children born out of wedlock shall enjoy the same rights as children born in lawful wedlock. No person shall be allowed to harm or to discriminate against them.
>
> Where the paternity of a child born out of wedlock is legally established by the mother of the child or by other witnesses or by other material evidence, the identified father must bear the whole or part of the cost of maintenance and education of the child until the age of 18.
>
> With the consent of the mother, the natural father may have the custody of the child.
>
> With regard to the maintenance of a child born out of wedlock, in case its mother marries, the provisions of Article 22 shall apply.

EXHIBIT 3

We considered the provisions of Article 15 of the Marriage Law in Matter of Lo, Interim Decision 2209 (BIA 1973). In that case we held that where there was no evidence in the record that paternity had been "legally established" in accordance with Article 15, the petitioner had not established that the beneficiary was his legitimate child. Our holding made it unnecessary for us to reach the question of whether legally establishing paternity pursuant to Article 15 is tantamount to legitimation for immigration purposes.

We reject counsel's contention that our discussion of Article 15 in Lo was dictum. That discussion was necessary to our ultimate holding in Lo. Moreover, we are not persuaded by counsel's argument that there is no distinction between children born in wedlock and those born out of wedlock in the People's Republic of China. If that were the case, the provisions of Article 15 providing that the paternity of a child born out of wedlock must be "legally established" before the father is obligated to contribute to the child's maintenance and education, and that the natural father of such a child may have custody only upon the consent of the mother, would appear to be superfluous.

Counsel asserts that our position in Lo conflicts with the interpretation given Article 15 by the Library of Congress in a memorandum dated July 5, 1973, which was submitted by counsel. Without conceding that our position is necessarily irreconcilable with the language used by the Library of Congress, we emphasize that the Board, not the Library of Congress, must make the ultimate interpretation of foreign statutory provisions in immigration cases.

Counsel cites Matter of K-, 8 I&N Dec. 73 (BIA 1958), and Matter of G-, 9 I&N Dec. 518 (BIA 1961), as cases which conflict with our interpretation of Article 15. Those cases involved children who had been legitimated through acknowledgment by their fathers under the laws

of Poland and Hungary, respectively, and are not applicable to the present situation involving Article 15 of the Marriage Law of the People's Republic of China. Moreover, in Matter of Kubicka, Interim Decision 2189 (BIA 1972), we noted that our language in Matter of K-, supra, was imprecise in referring to the child involved as "legitimate" rather than "legitimated." See also Matter of Dela Rosa, Interim Decision 2297 (BIA 1974).

Finally, while conceding that we have no authority to consider the constitutionality of the statutes which we administer, counsel asks that we "construe" the Act so that it does not discriminate against the fathers of illegitimate children. The short answer to that contention is that we cannot use the guise of statutory construction to substitute our judgment for that of Congress.

There is no evidence in the record to indicate that the paternity of the beneficiary was ever legally established in compliance with Article 15 of the Marriage Law of the People's Republic of China. Consequently, the beneficiary cannot qualify for preference status as the petitioner's son under the Act. Matter of Lo, supra.

The District Director's decision was correct. The appeal will be dismissed.

ORDER: The appeal is dismissed.

Chairman

THB:ml
75-0947

A 16

U.S. DISTRICT COURT
FILED
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

CHIN LAU,

Plaintiff,

- v -

MAURICE F. KILEY, District Director of the New York District, IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

- - - - - - - - - - - - - - - - - - - -x

ANSWER

75 Civ. 1237(LFM)

Defendant, by his attorney, Paul J. Curran, United States Attorney for the Southern District of New York, for his answer to the complaint herein, respectfully alleges as follows:

1. Admits the allegations contained in paragraphs numbered 1, 2, 9 and 10 of the complaint.

2. Denies the allegations contained in paragraph 6 of the complaint except admits that plaintiff filed said petition on behalf of a person named Kim Kok Lau.

3. Denies knowledge and/or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered 4, 5, 7 and 8 of the complaint.

4. Denies each and every allegation contained in paragraphs numbered 11, 12, 13 and 14 of the complaint.

5. Neither admits nor denies the allegations contained in paragraph number 3 of the complaint since it states a conclusion of law.

FIRST AFFIRMATIVE DEFENSE

6. The complaint fails to state a cause of action upon which relief may be granted.

WHEREFORE, defendant demands judgment dismissing the complaint herein, with costs and disbursements of the action, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York

June , 1975.

PAUL J. CURRAN
United States Attorney
for the Southern District
of New York
Attorney for Defendant

By: Thomas H. Belote
THOMAS H. BELOTE
Special Assistant
United States Attorney
Office & P.O. Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-9166

THB:ml
75-0947

A 18

To: BENJAMIN GIM
Attorney for Plaintiff
217 Park Row
New York, New York 10038

Edward J. Ennis
Attorney for Plaintiff
8 West 40th Street
New York, New York

THB:ka
75-0907

Filed
12/11/75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

CHIN LAU,

Plaintiff,

-v-

MADRICK F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice,

Defendant.

- x

NOTICE OF MOTION FOR SUMMARY JUDGMENT

75 Civ. 1237 (LFM)

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit and Rule 9(g) statement of Thomas H. Baleta, Special Assistant United States Attorney for the Southern District of New York, and upon all papers filed and proceedings had herein, the undersigned will move this Court on submission of the papers filed herein before the Hon. Lloyd F. MacMahon, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment for the defendant and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York

December 11, 1975

THE:ml
75-0907

Yours, etc.,

THOMAS J. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for Defendant,

By: _____
THOMAS H. BELOTE,
Special Assistant United States
Attorney,
Office & P.O. Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-9166

To: EDWARD J. KEMEL, Esq.,
8 West 40th Street
New York, New York

Benjamin Gim, Esq.,
217 Park Row
New York, New York 10038

THE:lk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHIN LAU,

Plaintiff,

- v -

MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice,

Defendant.

RULE 9(g) STATEMENT

75 Civ. 1237 (LBS)

1. Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9(g) of the General Rules for the United States District Court for the Southern District of New York, the defendant, by his attorney, Thomas J. Cahill, United States Attorney for the Southern District of New York, submits this statement and contends that as to the following material facts there is no genuine issue to be tried.

2. The plaintiff, Chin Lau, is a male native and citizen of China who first entered the United States as a lawful permanent resident alien on May 19, 1966. He is presently a resident of New York. In 1973 he married a permanent resident alien. The plaintiff alleges that this is his first and only marriage.

3. The defendant Maurice F. Kiley, is the District Director of the Immigration and Naturalization Service for the District of New York (the "Service"). He is authorized by law pursuant to the regulations of the Attorney General of the United States to consider and grant or deny visa petitions filed by permanent resident aliens under Section 204 of the Immigration and Nationality Act (the "Act") 8 U.S.C. § 1154 for preference status for alien unmarried sons and daughters pursuant to Section 203(a)(2) of the Act, 8 U.S.C. §1153(a)(2) seeking to emigrate to the United States.

4. On September 13, 1973 the plaintiff filed a visa petition with the defendant on behalf of Kin Kek Lau pursuant to Section 204 of the Act, 8 U.S.C. §1154. The purpose of this petition was to obtain a

preference status for Kin Kok Lau under Section 203(a)(2) of the Act, 8 U.S.C. § 1153(a)(2). The approval of such a petition by the Service would provide a benefit to Kin Kok Lau under the Act in that he might thereby have the privilege of obtaining an immigrant visa for emigration to the United States ahead of other similarly situated aliens who also desire to enter the United States as immigrants.

5. In this visa petition the plaintiff alleged that Kin Kok Lau was his unmarried son. In support of this petition the plaintiff submitted an affidavit in which he alleged that while he was residing in China in or about 1947 he began cohabiting with a woman named Chin Dung You. The plaintiff further alleged that he did not marry, and has never been married to Chin Dung You, but as a result of their relationship two children were born to them. Kin Kok Lau, the beneficiary of the above mentioned visa petition is alleged by the plaintiff to be one of these children having been born out of wedlock to the plaintiff and Chin Dung You on June 16, 1952 in Hoksan, Kwangtung, China. The plaintiff also submitted two additional affidavits and other documentary material as evidence to substantiate his claim that there exists a filial relationship between himself and Kin Kok Lau, and to support his claim that Kin Kok Lau is therefore eligible for a preference status under Section 203(a)(2) of the Act, 8 U.S.C. § 1153(a)(2).

6. On February 28,1974 the Service rendered a decision denying the plaintiff's petition. The basis for that denial was that the evidence presented by the plaintiff disclosed that Kin Kok Lau was illegitimate at birth and that the plaintiff had neither married Kin Kok Lau's mother or otherwise legitimated the beneficiary of the visa petition. Therefore it was concluded that under 8 U.S.C. §1153 and 8 U.S.C. §1101 Kin Kok Lau was not entitled to the preference status sought in the petition.

7. On March 8, 1974 the plaintiff appealed the Service's decision pursuant to 8 C.F.R. §3.1(b)(5) to the Board of Immigration Appeals of the United States Department of Justice (the "Board"). On October 23, 1974 the Board rendered a decision and dismissed the plaintiff's appeal.

In reaching that determination the Board stated: (a) in order to qualify as a "son" for preference purposes under Section 203(a)(2) of the Act, 8 U.S.C. §1153(a)(2), the beneficiary of a visa petition must once have qualified as a "child" of the petitioning person under Section 101(b)(1) of the Act, 8 U.S.C. §1101(b)(1), and that the burden of establishing the existence of that relationship rests upon the petitioner; (b) that there was no evidence in the record indicating that the paternity of Kin Kak Lau was ever "legally established" in compliance with Article 15 of the Marriage Law of the People's Republic of China, and therefore he was not the legitimate or legitimated son of the plaintiff under the law of the child's residence or domicile, i.e., the People's Republic of China; (c) that in absence of such evidence, Kin Kak Lau did not qualify for preference status as the plaintiff's son under Section 203(a)(2) of the Act, supra; (d) that the Board had no authority to consider the constitutionality of the statutes they administer and that they could not construe Section 101(b)(1)(D) of the Act to include an illegitimate child who claims a preference status through its natural father.

8. Article 15 of the Marriage Law of the People's Republic of China, promulgated May 1, 1950, states:

> Children born out of wedlock shall enjoy the same rights as children born in lawful wedlock. No person shall be allowed to harm or to discriminate against them.
>
> Where the paternity of a child born out of wedlock is legally established by the mother of the child or by other witnesses or by other material evidence, the identified father must bear the whole or part of the cost of maintenance and education of the child until the age of 18.
>
> With the consent of the mother, the natural father may have the custody of the child.
>
> With regard to the maintenance of a child born out of wedlock, in case its mother marries, the provisions of Article 22 shall apply.

9. On March 13, 1975 the plaintiff filed this action seeking review of the Board's decision.

Dated: New York, New York

December , 1975

Respectfully submitted,

THOMAS J. CAHILL
United States Attorney for the
Southern District of New York

By: _____
THOMAS H. BELOTS
Special Assistant United States Attorney

THB:ml
75-0907

A 25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

CHIN LAU,

Plaintiff,

- v -

MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice,

Defendant.

- -x

AFFIDAVIT

75 Civ. 1237 (LFM)

STATE OF NEW YORK :
SS.:
COUNTY OF NEW YORK :

THOMAS H. BELOTE, being duly sworn deposes and says:

1. I am a Special Assistant United States Attorney in the office of Thomas J. Cahill, United States Attorney for the Southern District of New York, attorney for the defendant herein, and as such I am in charge of this action. Defendant by his attorney, Thomas J. Cahill, submits this affidavit in support of his motion for summary judgment. This affidavit is based upon the administrative file of the Immigration and Naturalization Service (the "Service") relating to the plaintiff.

2. The plaintiff, Chin Lau, is a male, native and citizen of China, who was admitted to the United States on May 19, 1966 as a lawful permanent resident alien.

3. On September 13, 1973 the plaintiff submitted to the Service's district office in New York a visa petition, Form I-130 (Exhibit A) on behalf of another alien, Kin Kok Lau, and other documentary evidence in support of that petition. In the visa petition and supporting documents the plaintiff alleged that while he was residing in China prior to his admission to the United States, and in or about 1947, he began cohabiting with a woman, Chin Dung You. He alleged that he did not marry, and has never been married to Chin Dung You, but as a result of their relationship two children were born to them. The plaintiff alleged that the beneficiary of the above-mentioned visa petition, Kin Kok Lau, is his natural son having been born out of wedlock to the plaintiff and Chin Dung You in Koksan, Kwangtung, China on June 16, 1952. As a result of the above the plaintiff maintained that Kin Kok Lau was entitled to a preference status under Section 203(a)(2) of the Immigration and Nationality Act, 8 U.S.C. §1152(a)(2) as the unmarried son of an alien lawfully admitted to the United States as a permanent resident.

4. The approval of that visa petition by the Service would have granted Kin Kok Lau the privilege of

being considered a "second preference" prospective immigrant, and pursuant to the numerical limitation on the number of immigrants permitted to enter the United States this would have afforded Kin Kok Lau a substantial benefit in terms of obtaining a priority for consideration by a United States Consulate for the issuance of an immigrant visa ahead of other aliens similarly situated. Despite this possible preferential treatment, the granting of that visa petition would not bestow upon the plaintiff's alleged son an immigrant visa. The issuance of a visa itself is the sole responsibility of the Department of State through its consular offices, and even if a visa petition is approved by the Service the consulate at which an alien applies for an immigrant visa must still pass upon the prospective alien's eligibility before a visa can be issued. Alternatively, the denial of the visa petition submitted by the plaintiff on behalf of his alleged son would not bar the latter from entering the United States. Kin Kok Lau might attempt to qualify for and obtain another form of preference status such as a preference based upon labor skills, or he could apply for an immigrant visa as a "non-preference" prospective immigrant. In the latter case he would be placed in a position equal to other prospective immigrants seeking to enter the United States who also lack the essential characteristics which might qualify them for the preferred positions under Section 203 of the

Act, 8 U.S.C. §1152. In any event the approval of the plaintiff's visa petition by the Service would grant a substantial privilege to Kin Kok Lau in terms of his ultimate consideration for an immigrant visa.

5. On February 28, 1974 the Service rendered a decision on the visa petition submitted by the alien-plaintiff on behalf of Kin Kok Lau. Without determining whether Kin Kok Lau was the natural son of the plaintiff the Service district office determined that even if the beneficiary of the visa petition was the natural offspring of the plaintiff and Chin Dung You, nonetheless, Kin Kok Lau was statutorily ineligible to be granted the preference status in that he had never been the legitimate or legitimated child of the alien-plaintiff as required by Section non(b)(1) of the Act, 8 U.S.C. §1101(b)(1), and, therefore, the alleged son could not qualify for the immigration benefits of Section 203(a)(2) of the Act (Exhibit B).

6. On March 8, 1974 the plaintiff appealed the decision of the Service's district office to the Board of Immigration Appeals (the "Board") pursuant to 8 C.F.R. §3.1(b)(5). In support of the plaintiff's contention that natural filiation existed between himself and Kin Kok Lau additional documentation was submitted in support of the petition.

7. On appeal to the Board the alien-plaintiff argued that Kin Kok Lau was his legitimate or legitimated son under the law of the People's Republic of China, and, therefore, he was statutorily eligible for consideration of his visa petition for second preference status. Specifically, the plaintiff argued that under Article 15 of the Marriage Law of the People's Republic of China, promulgated May 1, 1950, children born out of wedlock share the same rights as children born in wedlock. Therefore he argued, Kin Kok Lau was a "child" as defined in Section 101(b)(1) of the Act, 8 U.S.C. §1101, and eligible to qualify for preference status as the plaintiff's unmarried son under Section 203.

8. On October 23, 1974 the Board rendered its decision dismissing the appeal and affirming the decision of the District Director (Exhibit C). Without determining whether in fact a blood relationship and natural filiation existed between the alien-petitioner and the alleged son, the Board stated that the plaintiff had failed in his burden of proof to demonstrate that Kin Kok Lau was statutorily eligible to be granted the preference classification which was being sought pursuant to Section 203(a)(2) of the Act. The decision stated that in order for Kin Kok Lau to qualify as an unmarried son of a lawful permanent resident he must have once qualified as a "child" of the petitioning alien

under Section 101(b)(1) of the Act. In order for Kin Kok Lau to qualify as a "child" the plaintiff shoulders the burden of demonstrating that Kin Kok Lau is a legitimate son, or that he had been legitimated under the requirements of Section 101(b)(1)(C). The Board rejected the plaintiff's argument any child born out of wedlock in the People's Republic of China after the promulgation date of the Marriage Law is a legitimate child and therefore eligible for preference status under the Act. The Board, examining Article 15 of the Marriage Law, in toto, determined that in order that a child born out of wedlock be considered a "child" for immigration purposes there must be some indication that the paternity of that child had been "legally established" in compliance with Article 15 of the Marriage Law.

9. The Board also declined to construe Section 101(b)(1) such that the illegitimate child of a male visa petitioner is granted identical privileges that now exist under §101(b)(1)(D) for an illegitimate child claiming immigration benefits through its natural mother. Section 101(b)(1) is quite specific in its mandate that only illegitimate children who seek immigration benefits through their natural mother are eligible to be considered children under Section 101(b)(1). To construe that section otherwise and include illegitimate children of male petitioners would clearly be contrary to the explicit Congressional scheme of the Act.

10. It is respectfully submitted that the decision of the Board in the administrative proceedings below was proper in its findings and conclusions. The Board's decision that the legitimation by the father of a child born out of wedlock occurs upon the legal establishment of that child's paternity is the proper construction of Article 15 of the Marriage Law. Furthermore, this interpretation is not irreconcilable with an advisory opinion obtained from the Library of Congress. In fact, the interpretation that legitimacy occurs upon the legal establishment of paternity is supported in an advisory opinion of August 7, 1975 by Tao-Tai Hsia, Chief, Far Eastern Law Division, Library of Congress, wherein he states in part:

> "...It should be noted here, however, that probably no distinction would be drawn between legitimation and establishment of paternity. This is so because the rights of children born in and out of wedlock are identical and because a man whose paternity of a child has been established is obligated to assume the duties of father with respect to the child upon establishment of paternity." (Exhibit D).

Nonetheless, as stated in the administrative decision of October 23, 1974 the Board of Immigration Appeals has the delegated statutory authority regarding the ultimate interpretation of foreign statutory provisions in immigration cases. In light of the paucity of information concerning the legal system of the People's Republic of China, the express language of Article 15, supra, and the statutory

burden imposed upon an alien to prove his eligibility to qualify for the desired preference status, the Board was correct in denying the visa petition submitted by the plaintiff.

II. It is also submitted that the Board acted properly in refusing to interpret Section 101(b)(1) as including illegitimate children who seek to obtain a preferential status under the Act by virtue of their relationship to their natural fathers. Congress expressly limited that privilege solely to an illegitimate child who seeks the benefit by virtue of that child's relationship to its natural mother under Section 101(b)(1)(D) of the Act. This explicit requirement regulating the entry of certain aliens into the United States is a constitutionally permissible classification adopted by Congress pursuant to its plenary power to make rules for the admission of aliens into this country. The plaintiff's claim that Section 101(b)(1) denies his equal protection and due process of law is without merit. The standards adopted by Congress for the admission of aliens is not a justiciable question, and, therefore, this Court lacks jurisdiction to review the statutory classifications created by Congress regulating the entry of aliens into the United States. Furthermore, to the extent that this Court should hold these statutes subject to judicial review, the challenged classifications

are part of a reasonable Congressional scheme to separate "real" family units from "sham" family units in a manner that will prevent fraudulent claims for preference status, allow for the efficient administration of immigration laws and satisfy congressional concern over the separation of certain family units.

12. Finally, summary judgment is the proper manner for judicial review of the agency's action in this case. The Courts have consistently held that summary judgment is a proper method for review of a denial of a preference status under the Act. The visa petition relating to this action was denied by the Board solely as a matter of law. Both the District Director and the Board found that Kin Kak Lau did not meet the statutory definition of a child under Section 101(b)(1). At no time was the existence or nonexistence of a blood relationship a finding by the agency below. Therefore, even if this Court found that the Board decision was in error, and it is respectfully submitted that this is not the case, since the plaintiff is not entitled to a trial de novo in this action the matter would have to be remanded back to the Service for additional factual findings relating to the existence of the claimed filial relationship.

WHEREFORE it is prayed that the Court affirm

THB:ml
75-0907

the decision of the Board of Immigration Appeals and grant summary judgment to the defendant dismissing this action.

/S/

THOMAS H. BELOTE
Special Assistant United States Attorney

Sworn to before me this

11th day of December, 1975.

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PETITION TO CLASSIFY STATUS OF ALIEN RELATIVE FOR ISSUANCE OF IMMIGRANT VISA

U.S. Sec. of S. received
73 AM 9:27

Fee stamp

Typ(m)9287

TO THE SECRETARY OF STATE:

The petition was filed on .....

The petition is approved for status under section:

☐ 201 (b) SPOUSE, CHILD ☐ 203 (a) (2)
☐ 201 (b) PARENT ☐ 203 (a) (4)
☐ 203 (a) (1) ☐ 203 (a) (5)

DATE OF ACTION
DD
DISTRICT

Remarks

(PETITIONER IS NOT TO WRITE ABOVE THIS LINE)

1. Petition is hereby made to classify the status of the alien beneficiary for issuance of an immigrant visa as: *(Check one)*

☐ The spouse, child (regardless of age), parent, brother, or sister of a United States citizen.
☒ The spouse or unmarried child (regardless of age) of an alien lawfully admitted to the United States for permanent residence.

Block 1 — Information About Alien Beneficiary

2. Name (Last, in CAPS) (First) (Middle)
LAU Kin Kok

3. Do Not Write in This Space
A20123881

4. Relationship of beneficiary to petitioner
son

5. Other names used; (including maiden name if married woman)

6. Are beneficiary and petitioner related by adoption?
no

7. Place of birth (Country)
China

8. Date of birth (Month, day, year)
6/16/52

9. Beneficiary's marital status:
☐ Married ☐ Widowed ☐ Divorced ☒ Single

10. *Petitioner's* name (Last, in CAPS) (First) (Middle)
LAU Chin

11. *Petitioner's* phone

12. Has this beneficiary ever been in the U.S.?
☐ Yes ☒ No

13. Name of beneficiary's spouse, if married, and date and country of birth (Omit this item if petition is for your spouse)

14. Names, birthdates and countries of birth of beneficiary's children, if any

15. Full address of beneficiary's spouse and children, if any (Omit this item if petition is for your spouse)

16. If this petition is for your spouse or child, give the following:

a. Date and place of your present marriage
9/21/71 N.Y.C.

b. Number of your prior marriages
0

c. Number of prior marriages of spouse
2

d. Last address at which you and your spouse resided together
(Town or City) (State or Province) (Country) (Apt No.) (Number and street)
41 Jefferson St., Apt. 15, Brooklyn, N.Y.
From (Month) (Year) 9 71
To (Month) (Year) date

17. If this petition is for a child, *(a)*. Is the child married? no *(b)* Is the child your adopted child? no If so, give the names, dates, and places of birth of all other children adopted by you. If none, so state

18. If this petition is for a brother or sister, are both your parents the same as the alien's parent? ..... If not, submit a separate statement giving full details as to parentage, dates of marriage of parents, and the number of previous marriages of each parent.

19. If separate petitions are also being submitted for other relatives, give names of each and relationship to petitioner

20. Have you ever filed a petition for this alien before? no If so, give place and date of filing and result:

FORM I-130
(REV. 11-1-72)N

RECEIVED	TRANS. IN	RET'D. TRANS. OUT	COMPLETED
30			

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Block I. – Information About Alien Beneficiary (Continued)

21. Address in the United States where beneficiary will reside (City) (State)
41 Jefferson St., Brooklyn, N.Y.

22. Address at which beneficiary is presently residing (Apt. No.) (Number and street) (Town or city) (Province or State) (Zip Code if in U.S.)
c/o Mr. Ho Man, c/o Chung Ying Rest., 19-23 Saigon St., Kln., H.K.

23. If beneficiary is in the United States, give the following information concerning beneficiary:

a. He last arrived in the U.S. on (Month) (Day) (Year)	b. He last arrived in U.S. as (Visitor, student, exchange alien, crewman, stowaway, etc.)	c. Show date beneficiary's stay expired or will expire as shown on his Form I-94 or I-95:

d. Name and address of present employer

e. Date alien began this employment

24. Check the appropriate box below and furnish the information required for the box checked:

[X] Beneficiary will apply for a visa abroad at the American Consulate in Hong Kong
(CITY IN FOREIGN COUNTRY) (FOREIGN COUNTRY)

[ ] Beneficiary is in the United States and will apply for adjustment of status to that of a lawful permanent resident in the Office of the Immigration and Naturalization Service at
(CITY) (STATE)

If the application for adjustment of status is denied, the beneficiary will apply for a visa abroad at the American Consulate in
(CITY IN FOREIGN COUNTRY) (FOREIGN COUNTRY)

Block II. – Information About Petitioner A 13 231 839

25. My name is (Last)	(First)	(Middle)	26. Other names used; (including maiden name of married woman)
LAU	Chin		LAU Bing Wing

27. I reside in the United States at (Apt. No.) (Number and street) (Town or city) (State) (ZIP Code)
15 41 Jefferson St., Brooklyn, N.Y. 11206

28. Address abroad (if any) (Number and street) (City or town) (Province) (Country)

29. I was born: (Month) (Day) (Year) in (City or town) (State or Province) (Country)
8/15/27 Hoksan, Kwangtung, China

30. If you are a citizen of the United States, give the following:

a. Citizenship was acquired: (Check one)

[ ] through birth in the U.S. [ ] through parents [ ] through naturalization [ ] through marriage

(1) If acquired through naturalization, give name under which naturalized, number of naturalization certificate, and date and place of naturalization.

(2) If acquired through parentage or marriage, have you obtained a certificate of citizenship in your own name based on such acquisition?

(a) If so, give number of certificate and date and place of issuance.

(b) If not, submit evidence of citizenship in accordance with Instruction 3a (2).

b. Have you or any person through whom you claim citizenship ever lost United States citizenship?
If so, attach detailed explanation on separate sheet.

31. If you are a lawful permanent resident alien of the United States, give the following:

a. Alien Registration Number: A 13 231 839

b. Date, place, and means of admission for lawful permanent residence 5/19/66 Sea. via NWA F2-2

c. Have you ever lost status as a lawful permanent resident alien? no If so, explain: INS verified TIRO, TS 1/19/74

(If you are married to a citizen of the United States, read instruction 1b carefully)

32. Have you attached all required documents (see instruction No. 3)? [ ] Yes

Block III. – Oath or Affirmation of Petitioner

I swear (affirm) that I know the contents of this petition signed by me and that the statements herein are true and correct.

Signature of petitioner (See Instruction No. 5) Chin Lau

Subscribed and sworn to (affirmed) before me this 7th day of Sept. AD 19 73 at New York, N.Y.

(SEAL) My commission expires

(SIGNATURE OF OFFICER ADMINISTERING OATH) (TITLE)

Block IV. – Signature of Person Preparing Form, If Other Than Petitioner

I declare that this document was prepared by me at the request of the petitioner and is based on all information of which I have any knowledge.

(SIGNATURE) 217 Park Row, New York, N.Y. 10038 (ADDRESS) 9/7/73 (DATE)

BEST COPY AVAILABLE

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NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

SUBMIT IN TRIPLICATE TO:

IMMIGRATION AND NATURALIZATION SERVICE

22 West Broadway

New York, N.Y.

For Stamp

In the Matter of:

Visa Petition of Chin LAU On Behalf of Kin Kok LAU, Son.

File No. A20 122 881

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated Feb. 28, 1974, in the above entitled case.

2. Briefly, state reasons for this appeal.

The reasons will be stated in a brief to be submitted later.

3. I do (do) (do not) desire oral argument before the Board of Immigration Appeals in Washington, D. C.

4. I will be (am) (am not) filing a separate written brief or statement.

Signature of applicant or attorney or representative

BENJAMIN GIM

(Print or type name)

March 8, 1974

Date

217 Park Row, New York, N.Y.

Address (Number, Street, City, State, Zip Code)

IMPORTANT: SEE INSTRUCTIONS ON REVERSE SIDE OF THIS NOTICE

Form I-290A
(Rev. 2-15-71)N

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
20 West Broadway
New York, New York 10007

A 38

REFER TO THIS FILE NO.
A20 122 881

FEB 28 1974

Chin Lau
41 Jefferson Street, Apt. 15
Brooklyn, New York 11206

Date: February 28, 1974

DECISION

Upon consideration, it is ordered that your visa petition filed in behalf of Kin Kok Lau be denied for the following reasons:

See attached sheet

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed within 15 days from the date of this notice. If no appeal is filed within the time allowed, this decision is final. Appeal in your case may be made to:

☒ Board of Immigration Appeals in Washington, D. C., on the enclosed Forms I-290 A.

☐ Regional Commissioner on the enclosed Form I-290 B.

If an appeal is desired, the Notice of Appeal shall be executed and filed with this office, together with a fee of $25. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any question which you may have will be answered by the local immigration office nearest your residence, or at the address shown in the heading to this letter.

cc: Benjamin Gim, Esq.
217 Park Row
New York, New York 10038

Sincerely yours,

Sol Marks
District Director

Enclosure(s)

Form I-292
(Rev. 9-1-69)

Section 101(b)(1) of the Immigration and Nationality Act provides that any relationship of a child through a father must be as a result of a valid marriage and the child must be legitimate or have been legitimated before the child reaches the age of eighteen years.

The facts presented disclose that the beneficiary was illegitimate at birth and that you never married the mother of the beneficiary. In addition, no evidence has been presented to establish that the beneficiary has been legitimated.

In view of the foregoing, the beneficiary is not entitled to any status on the basis of your visa petition.

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United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

File: A20 122 881 - New York

OCT 23 1974

In re: KIN FOK LAU, Beneficiary of visa petition filed by CHIN LAU, Petitioner

IN VISA PETITION PROCEEDINGS

APPEAL

ON BEHALF OF PETITIONER: Benjamin Shu, Esq.
217 Park Row
New York, New York 10038

ON BEHALF OF INS SERVICE: David L. Milhollan
Appellate Trial Attorney

ORAL ARGUMENT: June 18, 1974

APPLICATION: Petition to classify status of alien relative for issuance of immigrant visa

The lawful permanent resident petitioner applied for preference status for the beneficiary as his unmarried son under section 203(a)(2) of the Immigration and Nationality Act. In a decision dated February 28, 1974, the District Director denied the petition on the ground that the beneficiary was not the legitimate or legitimated son of the petitioner. The petitioner has appealed from the decision. The appeal will be dismissed.

The petitioner is a male who is a native and citizen of China. The beneficiary was allegedly born in 1952, in the People's Republic of China, as the result of a relationship between the petitioner and Chin Dung You. The petitioner never married Chin Dung You.

A20 122 881

In order to qualify as a "son" for preference purposes, a beneficiary must once have qualified as a "child" of the petitioner under section 101(b)(1) of the Act. Matter of Coker, Interim Decision 2255 (BIA 1974). The applicable portions of section 101(b)(1) define a "child" as the legitimate child, or a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, if such legitimation takes place before the child reaches the age of 18 years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation. The burden of establishing the existence of the required relationship rests upon the petitioner. Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966).

Counsel claims that the beneficiary is the petitioner's legitimate child under the provisions of Article 15 of the Marriage Law of the People's Republic of China, promulgated May 1, 1950, which states:

> Children born out of wedlock shall enjoy the same rights as children born in lawful wedlock. No person shall be allowed to harm or to discriminate against them.
>
> Where the paternity of a child born out of wedlock is legally established by the mother of the child or by other witnesses or by other material evidence, the identified father must bear the whole or part of the cost of maintenance and education of the child until the age of 18.
>
> With the consent of the mother, the natural father may have the custody of the child.
>
> With regard to the maintenance of a child born out of wedlock, in case its mother marries, the provisions of Article 22 shall apply.

We considered the provisions of Article 15 of the Marriage Law in Matter of Lo, Interim Decision 2209 (BIA 1973). In that case we held that where there was no evidence in the record that paternity had been "legally established" in accordance with Article 15, the petitioner had not established that the beneficiary was his legitimate child. Our holding made it unnecessary for us to reach the question of whether legally establishing paternity pursuant to Article 15 is tantamount to legitimation for immigration purposes.

We reject counsel's contention that our discussion of Article 15 in Lo was dictum. That discussion was necessary to our ultimate holding in Lo. Moreover, we are not persuaded by counsel's argument that there is no distinction between children born in wedlock and those born out of wedlock in the People's Republic of China. If that were the case, the provisions of Article 15 providing that the paternity of a child born out of wedlock must be "legally established" before the father is obligated to contribute to the child's maintenance and education, and that the natural father of such a child may have custody only upon the consent of the mother, would appear to be superfluous.

Counsel asserts that our position in Lo conflicts with the interpretation given Article 15 by the Library of Congress in a memorandum dated July 5, 1973, which was submitted by counsel. Without conceding that our position is necessarily irreconcilable with the language used by the Library of Congress, we emphasize that the Board, not the Library of Congress, must make the ultimate interpretation of foreign statutory provisions in immigration cases.

Counsel cites Matter of K-, 8 I&N Dec. 73 (BIA 1958), and Matter of G-, 9 I&N Dec. 518 (BIA 1961), as cases which conflict with our interpretation of Article 15. Those cases involved children who had been legitimated through acknowledgment by their fathers under the laws

A20 122 881

of Poland and Hungary, respectively, and are not applicable to the present situation involving Article 15 of the Marriage Law of the People's Republic of China. Moreover, in Matter of Kubicka, Interim Decision 2189 (BIA 1972), we noted that our language in Matter of K-, supra, was imprecise in referring to the child involved as "legitimate" rather than "legitimated." See also Matter of Dela Rosa, Interim Decision 2297 (BIA 1974).

Finally, while conceding that we have no authority to consider the constitutionality of the statutes which we administer, counsel asks that we "construe" the Act so that it does not discriminate against the fathers of illegitimate children. The short answer to that contention is that we cannot use the guise of statutory construction to substitute our judgment for that of Congress.

There is no evidence in the record to indicate that the paternity of the beneficiary was ever legally established in compliance with Article 15 of the Marriage Law of the People's Republic of China. Consequently, the beneficiary cannot qualify for preference status as the petitioner's son under the Act. Matter of Lo, supra.

The District Director's decision was correct. The appeal will be dismissed.

ORDER: The appeal is dismissed.

Chairman

A 44

THE LIBRARY OF CONGRESS

WASHINGTON, D. C. 20540

OFFICE OF THE
LAW LIBRARIAN OF CONGRESS

AUGUST 7 1975

Re: THB:ml

Dear Mr. Curran:

This is in response to your letter of July 15, 1975, concerning the question of illegitimacy under the 1950 Marriage Law of the People's Republic of China (PRC).

Your first question was with respect to what procedures exist in the PRC to legitimate a child or establish paternity. After surveying the sources available in the collection of the Law Library, we are unable to add anything more definite with respect to procedure than the general statement of the Marriage Law to the effect that the paternity of a child born out of wedlock may be legally established by the mother of the child or by other witnesses or by other material evidence. The most exhaustive study of marriage law in the PRC, M. J. Meijer's Marriage Law and Policy in the Chinese People's Republic (Hong Kong University Press, 1971), makes no statement with regard to procedure for either legitimation or establishment of paternity, nor do the Chinese sources available to us examine the question of procedure in cases involving children born out of wedlock. It should be noted here, however, that probably no distinction would be drawn between legitimation and establishment of paternity. This is so because the rights of children born in and out of wedlock are identical and because a man whose paternity of a child has been established is obligated to assume the duties of father with respect to the child upon establishment of his paternity. In other words, the status of legitimated child as a halfway house between illegitimacy and the status of legitimate child born in wedlock probably would not exist in the PRC.

The lacuna with respect to information about procedure in both the English and the Chinese sources is not surprising in view of the Communist Chinese attitude toward both procedure and the question of children born out of wedlock. Although both contraceptives and abortion are readily available in the PRC, the official attitude

does not countenance premarital or extramarital sex. When asked about illegitimacy, official spokesmen have insisted that it is a problem rarely encountered in China and have displayed an unwillingness to discuss the question at any length. In other words, part of the explanation for the dearth of discussion in Chinese sources of the question of children born out of wedlock is the government's lack of fondness for the topic. The other part is the government's lack of regard for the procedural aspects of law as they are understood in the West.

The People's Republic of China has not promulgated any code, procedural or substantive. In the years after the 1957 Anti-Rightist Campaign, the government and the Chinese Communist Party became ever more contemptuous of Western-style procedure in legal matters. Such procedure was regarded as a stumbling block to the application of the "mass line" and therefore a stumbling block to justice. This attitude was blatant during the Cultural Revolution period (1966-1969), and the little evidence available from subsequent years indicates that it has not significantly abated since.

Divorce is the only civil matter with respect to which evidence about procedure is available. This evidence indicates that strenuous efforts are made by various extra-judicial groups, such as the mediation committees or the street revolutionary committees (formerly residents' committees), to settle the matter through extra-judicial mediation. Jerome Cohen reported in 1972, in fact, that

> street revolutionary committees in Peking and Shanghai reported not only that they were now charged with responsibility for registering marriages and uncontested divorces (previously the task of the superior city district government) but that they also had the power to grant divorce even if one of the spouses opposed it (a power previously enjoyed exclusively by the courts). [See Jerome A. Cohen, "Chinese Law: At the Crossroads," American Bar Association Journal, Vol. 59, January 1973, p. 43.]

We are enclosing a copy of pages from a previously prepared report which give more information on the procedure of the extra-judicial groups and on divorce in the PRC, including one report of a divorce case before a court observed by an American specialist in Chinese law.

While divorce and paternity suits are not directly analogous, we suspect that much the same approach would apply to both. Thus, most likely the putative father and the mother would be required to submit to mediation by an extra-judicial body or would appear before a people's court or both. In the extra-judicial group and in the court procedure would be highly informal, and the whole question would be approached from the standpoint of socialist ideology.

As to the question of discrepancies betwen the rights of children born in and out of wedlock, we must conclude that the statement of their absolute equality contained in the 1950 Marriage Law must be taken quite literally. The Chinese sources available to us make no mention of there being any discrepancy. The most exhaustive Communist Chinese treatment of the question of inheritance and succession appears in Vol. 3 of Chung-hua jen min kung ho kuo min fa ts'an k'ao tzu liao [Reference Materials on the Civil Law of the People's Republic of China], compiled by the Office of Teaching and Research on Civil Law of the Chinese People's University (Peking, Chinese People's University, 1957). Although this source considers the question of inheritance from the point of view of cases involving spouses, children, adopted children, grandchildren, parents, grandparents, widows, brothers and sisters, nieces and nephews, etc., it makes no mention of cases involving children born out of wedlock. Its silence on the topic perhaps indicates that the right of a child born out of wedlock to be an heir is so identical to the right of a child born in wedlock that consideration by the court is unnecessary. In other words, the identity of the rights of these two types of children is such that it is apparently not subject to question or qualification by the court. Other Chinese sources we examined affirmed the identity of the rights of children born in and out of wedlock, and they did not add anything of substance to the subject beyond differentiating two types of children born out of wedlock: children born to concubines as the latter term was understood in the pre-Communist society and children born of adultery or fornication. See, for example, Hun yin fa wen ta [Questions and Answers on the Marriage Law], published by the Anhui People's High Court and the Legal Administrative Bureau, Ho-fei, 1964, p. 33-34.

As to the availability of any relevant cases construing Article 15 or other applicable statutes, we must report in the negative. The People's Republic of China has never published cases

in any meaningful sense. One finds occasional sources involving summaries of a number of cases, such as the selection from Chung hua jen min kung ho kuo min fa ts'an k'ao tzu liao mentioned above, but there never has been systematic publication of cases. As we mentioned above, the cases to which we have access do not consider the question of illegitimacy.

Sincerely yours,

Tao-tai Hsia, Chief
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Enclosure

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LEGAL SYSTEM IN THE PEOPLE'S REPUBLIC OF CHINA IN THE POST-CULTURAL REVOLUTION

Prepared by Kathryn A. Haun

1974

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Divorce Cases Before the Courts

Some information is also available on court activities in divorce cases.

A November 11, 1973, report in the New York Times contains statements made by Hsüeh Pao-hua, identified as a graduate of the National Political Science and Law School in Peking and a senior judicial official in Kwangtung province. Hsüeh's remarks about divorce suggest that the procedure outlined in the 1950 Marriage Law is apparently still being basically followed in his area. This procedure requires that divorce be granted without delay by the district people's government when it has determined that both parties want the divorce, but that both the district people's government and the court must attempt to reconcile the couple through mediation if only one party is insisting on the divorce.[22] Jerome Cohen wrote in 1972, however, that "street revolutionary committees in Peking and Shanghai reported not only that they were now charged with responsibility for registering marriages and uncontested divorces (previously the task of the superior city district government) but that they also had the power to grant divorce even if one of the spouses opposed it (a power previously enjoyed exclusively by the courts)."[23]

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[22] An English translation of the text of the 1950 Marriage Law appears in Fundamental Legal Documents, pp. 266-275.

[23] Cohen, "Chinese Law: At the Crossroads," p. 43.

One account of court divorce proceedings is available.[24] It suggests that, although the judge is present, the proceedings differ little from what we know of appearances before extra-judicial institutions, for popular participation in the proceedings is apparently being heavily stressed. The hearing before the judge in this case took place in the factory where the husband and wife were employed, with friends, co-workers and supervisors participating in large part by voicing ideological criticisms of the couple's difficulties, as well as reminding them of the affection that once existed between them. The couple's relationship was not an example, in the view of the representatives of the masses present at the hearing, of the proper socialist outlook, for it included the husband's past infidelity and beating of his wife and the wife's refusal or inability to refrain from condemning her spouse's infidelity in terms that provoked his attacks. The judge in this instance denied the divorce, upon which the wife had insisted, and the couple pledged to improve their attitude toward their marriage. The husband in addition was required to sign a guarantee that he would never again strike his wife; if so, the wife would be granted a divorce and he would be punished "according to law" if the blow also injured her. The American specialist in Chinese law who observed these proceedings noted that "the 'representatives of the masses' were clearly going to remain concerned with the couple's problems

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[24] Stanley Lubman, "A Divorce Trial--Peking Style," Wall Street Journal, June 5, 1973, p. 22.

after the trial." The ruling in this case seems to confirm the statement of the Kwangtung judicial official mentioned above that in the PRC "divorce is not granted lightly." The official is reported, however, to have added that the courts took into consideration whether "feeling existed between the husband and wife."[25]

The Role of the Judge

The account of this divorce hearing suggests that the judge was in many ways "primus inter pares," rather than the commanding figure in the proceedings. A downplaying of the role of the judge is also indicated in Chu Mu-chih's statement to C. L. Sulzberger that "a court, when making judgment, explains its views to the people and they explain their reactions."[26] This statement should be read against the background of our knowledge that a public trial was perhaps the exception even in the 1954 to 1957 constitutional period and a rarity in the years afterwards, so that the method of interchange of views between the judge and the people in criminal matters is less direct than that described above in the divorce case. The interchange in fact at times is only symbolic.

The official of the Yenan revolutionary committee that Sulzberger interviewed stated that the judges in his area were elected by the people, but it is questionable that his statement is to be

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25/ New York Times, November 11, 1973.

26/ New York Times, November 25, 1973.

time. Legal research institutes were also closed.[31] In May 1973 Stanley Lubman, another American specialist in Chinese law who visited the mainland, spoke with Peking University law professors, but his report does not indicate that any far-reaching discussion was held.[32] Officials implied to Cohen in 1972 that legal teaching and research would resume after the essential reorganization had been completed, but its completion seemed to be contingent upon promulgation of a new constitution by the Fourth National People's Congress.[33] Since to date the long-anticipated Fourth National People's Congress has not met, it may well be the case that legal education and research also have not yet resumed.

Extra-Judicial Institutions

Both Cohen and Lubman reported that, in contrast to the extreme reticence of the Chinese about judicial institutions, PRC officials were quite willing to display the extra-judicial institutions which participate in the resolution of disputes and the handling of some instances of misbehavior. Although in some cases their names have changed, these groups seem to be the same in structure and functions as

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[31] Ibid.

[32] Lubman, op. cit., p. 22.

[33] Cohen, "Notes on Legal Education," p. 18.

before the Cultural Revolution.

Communist Chinese society is highly organized. Every person is a member of one or several organizational networks by virtue of his place of residence, his place of employment, his age group, sex, or interests, and the right of any or all of these organizations to take an active interest in his affairs is affirmed. Hence, any or all of them can be mobilized to participate in the disposition of a troublesome situation in which he is involved.

Two groups that are quite frequently mentioned as participating in the extra-judicial disposition of disputes and misbehavior are the street revolutionary committees, including the residents' committees subordinate to them, and the mediation committees.[34/] The establishment of the street revolutionary committees (known as city street offices prior to the Cultural Revolution), the residents' committees, and the mediation committees were called for in three separate statutes, all

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34/ Prior to the Cultural Revolution and probably at present also there were as well the so-called "security defense committees," which concerned themselves more with assisting the public security organs in the prevention of crime and the identification of offenses and offenders than with mediation. For discussion of these committees, consult the headings "Security defense committee" and "Security Defense Committees, Provisional Act of the PRC for Organization of" in the index to Cohen, The Criminal Process, p. 705.

issued in 1954, and these groups still appear to be functioning essentially according to the provisions of these 1954 enactments.[35]

The street revolutionary committee is in charge of an area that usually is co-terminous with the area of a public security station; the population within such an area may be as high as 65,000 people. The members of the street revolutionary committee, who were to be appointed by the executive organ at the urban district level, assist the municipal government in the management of activities related to education, medical care, sanitation, welfare, production, service facilities, political propaganda, etc. Each street revolutionary committee is assisted in its work by a number of residents' committees, defined by statute as "mass autonomous residents' organizations," established with reference to an area generally including from one hundred to six hundred households. The tasks with which residents' committees are specifically charged include mediating disputes among residents. Since the street revolutionary committees are responsible for guiding the work of the residents' committees, they too would become involved in mediation of disputes. In the rural communes there exist groups comparable in

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35/ English translations of various provisions of the following enactments may be found in Cohen, The Criminal Process, pp. 109-112 and 123-125: Act of the PRC for the Organization of City Street Offices, Dec. 31, 1954; Act of the PRC for the Organization of City Residents' Committees, Dec. 31, 1954; and Provisional General Rules of the PRC for the Organization of People's Mediation Committees, March 22, 1954.

function to the city street revolutionary committees and the residents' committees.

General rules for the establishment of mediation committees in urban and rural areas were enacted in early 1954. Although it has been stated that these mediation committees apparently were absorbed into the structure of the street revolutionary and residents' committees subsequently established in urban areas, one recent report suggests that currently a network of mediation committees exists throughout China at the production brigade level in the countryside and the street committee level in urban areas in an imprecisely defined relationship to the various organs of government at these and higher levels.[36] Whether or not the mediation committees exist as separate, formally constituted entities or have had their functions assumed by other structures, such as the residents' committees, is not a question of major importance here, for the evidence indicates that the extra-judicial disposition of disputes and misbehavior proceeds along very similar lines regardless of the group conducting it.

According to the 1954 rules on the establishment of mediation committees, the tasks of these committees were to be the mediation of ordinary civil disputes among the people and minor criminal cases and the conduct of propaganda-education concerning policies, laws, and

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36/ New York Times, November 11, 1973.

decrees. Their three to eleven members were generally to be elected in the cities by representatives of the residents, under the direction of the basic level people's governments, and, in the countryside, by the people's congresses of the village (now commune). As to the actual conduct of mediation, the rules specify only that mediation must be in compliance with the policies, laws, and decrees of the people's government, and that the agreement of the parties must be obtained without coercion.

None of these 1954 statutes authorizes an extra-judicial group to impose sanctions of any sort in their mediation activities, but it seems clear that they have at their command a variety of sanctions, regarded as non-criminal, involving varying degrees of social pressure, mandatory self-criticism, and ideological education. In addition, as Cohen points out, because the members of these groups also have responsibility for the provision of a variety of social services and have ties with the public security organs, their recommendations are likely to carry some weight even in instances in which no specific sanction is attached.[37/]

Article 9 of the 1954 rules establishing the mediation committees provides that a people's court is to correct or annul actions of the mediation committees which violate policies, laws, or decrees, but the rules do not spell out how the violation is to be brought to

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37/ Cohen, The Criminal Process, p. 110.

the court's attention. The Kwangtung judicial official mentioned above indicated that the courts could reverse a ruling of a mediation committee regarded as contrary to the laws or policies of the Communist Party or government, but he too did not indicate the manner in which such a reversal could be brought about.[38] These groups are known to work closely with officials of both the government and the Party at the corresponding and higher levels, and imposition of the more stringent sanctions at their command almost certainly requires the prior approval of such officials. While the involvement of these officials probably reduces the probability of an aggrieved party attempting to bring an action of a mediation committee before the court, it also may, as the Chinese believe, reduce the risk of arbitrary action by committee members who take a narrow or personal view of the matter.

The extra-judicial groups are said to settle disputes and handle anti-social behavior primarily with a view toward the welfare of the socialist collective involved. The process apparently begins with analysis of the dispute or misbehavior from the standpoint of the official ideology in order to determine in what sense the party or parties involved are falling short of proper socialist conduct. The mediation may be conducted by one person, by several, or before a committee, with friends and co-workers also participating. In addition to hearing criticisms and suggestions from others, the person involved

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38/ New York Times, November 11, 1973.

is expected to offer his own criticisms of his behavior. Sanctions typically involve self-criticism offered in greater and greater detail before larger and larger groups, according to the seriousness of the problem being considered, and the necessity of having one's activities subjected to the scrutiny of others at varying intervals.

The Chinese view the extra-judicial disposition of disputes and misbehavior as having several advantages over litigation in court. First, because the mediation is conducted in the area of residence of the parties involved, the parties do not have to take off as much time from work, and so production does not suffer. Secondly, because the mediators are themselves residents of the area in which the parties live, they are likely to have some acquaintance with the overall situation of the parties involved and will not arrive at a position based on narrow consideration of the immediate facts at issue, an approach the Chinese reject. Third, the mediators can rely upon their physical proximity and their ability to mobilize other area residents in the application of social pressure on the party or parties found somehow at fault. They also will be in a position to learn or witness what efforts the person is making to accept the results of the mediation.

The Chinese have regarded the activities of such extra-judicial groups as the mediation committee as the first rung on the ladder of punishments. While it may be said that generally only the less serious problems were handled by such groups in the past, there were few or no hard and fast criteria made available to the public according to which

the scope of the mediation committees' activities could be determined. The Chinese preferred to keep a maximum of flexibility about the activities of the mediation committees. It is likely, however, that a great many of the problems disposed of by the extra-judicial institutions would not become objects of public concern in the many other countries which do not define the sphere of matters subject to public interference as broadly as do the Communist Chinese.

The lack of specific rules governing the activities of the extra-judicial institutions doubtless has both advantages and drawbacks. On the one hand, it may in fact enable the mediators to settle many matters in innovative ways or to avoid subjecting the parties to the burden of a trial and possible criminal record. On the other hand, it may be that these groups often provide official nourishment for the neighborhood "busybodies" and inept mediators, against whose decisions the parties may be without meaningful recourse.

Concluding Remarks

It is perhaps almost a reflexive reaction for the Westerner surveying the present state of law in the PRC to inquire about its future. The mass trials and apparent disregard for due process, even if only minimal criteria are set for the latter, offend Western standards of justice. The apparent disappearance of practicing lawyers, the protracted cessation of legal education and research (although these may have resumed in recent months without Westerners having become aware of the fact), and the reticence or silence about law challenge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

CHIN LAU,

Plaintiff,

- v -

MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice,

Defendant.

75 Civ. 1237 (LFM)

- -x

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

This is an action for declaratory relief brought by a resident alien of the United States in which he seeks to review the denial of a visa petition submitted by him on behalf of an alien currently seeking admission to the United States. The visa petition sought to have

the beneficiary of that petition granted a preference status under Section 203(a)(2) of the Immigration and Nationality Act, 8 U.S.C. §1253(a)(2). The approval of such a classification by the defendant agency would grant this prospective immigrant a preferred status over other similarly situated aliens with respect to obtaining an immigrant visa from the worldwide allotment of immigrant visas for the Eastern Hemisphere. Although the approval of the visa petition by the Attorney General is necessary under Section 204 of the Act, 8 U.S.C. §1154, to obtain the desired preference status, that status alone does not guarantee the prospective immigrant a visa. The alien must still be found eligible for the preference classification by consular officials and must be found admissible to the United States at the time he seeks entry. Alternatively, the denial of the petition does not bar the prospective immigrant from admission to the United States. In such a case the alien must prove that he or she qualifies for one of the other preference positions or apply for a visa as a non-preference immigrant.

The plaintiff sought to obtain a "second preference" classification under Section 203(a)(2) of the Act on the basis of his claim that the beneficiary was his unmarried son under Section 101(b)(1) of the Act, 8 U.S.C. §1101(b)(1). The Board of Immigration Appeals found that the beneficiary of the visa petition did not meet the requisite statutory criteria in order to be granted the preference classification and, therefore, was not eligible for the requested immigration benefit. The plaintiff now challenges the Board's decision alleging that it misinterpreted foreign law in determing whether the alien-beneficiary was statutorily eligible for preferred status under the Act. In addition, the plaintiff challenges Section 101(b)(1)(D) of the Act alleging it denies the plaintiff equal protection and due process under the law in that it unconstitutionally discriminates between illegitimate children who seek to obtain immigration benefits by virtue of their relationship to their natural fathers and illegitimate children who obtain

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immigration benefits by virtue of their relationship to their natural mothers. Defendant now moves for summary judgment on the action and submits that the Board of Immigration Appeals correctly interpreted and applied the foreign law in question and further submits that the classification created by Congress and set out in Section 101(b)(1) of the Act is a constitutionally permissible classification and alternatively, not subject to judicial review.

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RELEVANT STATUTES

Section 101(b) of the Immigration and Nationality Act, 8 U.S.C. §1101(b):

> (b) As used in titles I and II-
>
> (1) The term "child" means an unmarried person under twenty-one years of age who is-
>
> (A) a legitimate child; or
>
> (B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred; or
>
> (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation. [;or]
>
> (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;

Section 103(a) of the Immigration and Nationality Act, 8 U.S.C. §1103(a):

Powers and Duties of the Attorney General and the Commissioner

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The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act. He is authorized, in accordance with the civil-service laws and regulations and the Classification Act of 1949, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this Act; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the Service. He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to

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him shall appear necessary and proper. He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Service. He may, with the concurrence of the Secretary of State, establish offices of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this Act, detail employees of the Service for duty in foreign countries.

Section 203 of the Immigration and Nationality Act, 8 U.S.C. §1153:

Allocation of Immigrant Visas

(a) Aliens who are subject to the numerical limitations specified in section 201(a) shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

(1) Visas shall be first made available, in a number not to exceed 20 per centum of the number specified in section 201(a)(1), to qualified immigrants who are the unmarried sons or daughters of citizens of the United States.

(2) Visas shall next be made available, in a number not to exceed 20 per centum of the

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number specified in section 201(a)(ii), plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are the spouses, unmarried sons or unmarried daughters of an alien lawfully admitted for permanent residence.....

Section 204 of the Immigration and Nationality Act, 8 U.S.C. §1154:

Procedure for Granting Immigrant Status

(a) Any citizen of the United States claiming that an alien is entitled to a preference status by reason of the relationships described in paragraphs (1), (4), or (5) of section 203(a), or to an immediate relative status under section 201(b), or any alien lawfully admitted for permanent residence claiming that an alien is entitled to a preference status by reason of the relationship described in section 203 (a)(2), or any alien desiring to be classified as a preference immigrant under section 203 (a)(3) (or any person on behalf of such an alien), or any person desiring and intending to employ within the United States an alien entitled to classification as a preference immigrant under section 203(a)(6), may file a petition with the Attorney General for such classification. The petition shall be in such form as the Attorney General may by regulations prescribe and shall contain such information and be supported by such documentary evidence as the Attorney General may require. The petition shall be made under oath administered by any individual having authority to administer

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oaths, if executed in the United States, but, if executed outside the United States, administered by a consular officer or an immigration officer.

(b) After an investigation of the facts in each case, and after consulatation with the Secretary of Labor with respect to petitions to accord a status under section 203(a)(3) or (6), the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for a preference status under section 203(a), approved the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.....

(e) Nothing in this section shall be construed to entitle an immigrant, in behalf of whom a petition under this section is approved, to enter the United States as a preference immigrant under section 203(a) or as an immediate relative under section 201(b) if upon his arrival at a port of entry in the United States he is found not to be entitled to such classification.

Section 291 of the Immigration and Nationality Act, 8 U.S.C. §1361:

<u>Burden of Proof</u>

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to

establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act, and, if an alien, that he is entitled to the nonimmigrant [quota immigrant, or nonquota immigrant] status claimed, as the case, may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not subject to exclusion under any provision of this Act.....

ARGUMENT

POINT I

THE CLASSIFICATION OF ALIENS BY CONGRESS FOR ADMISSION INTO THE UNITED STATES IS NOT SUBJECT TO JUDICIAL REVIEW

The plaintiff challenges the constitutionality of one of the many classifications of aliens established by Congress as part of the comprehensive scheme for the admission of aliens into the United States under the Immigration and Nationality Act, 8 U.S.C. §1101 et seq. The plaintiff, a male alien seeking to obtain immigration benefits on behalf of his alleged illegitimate son, complains that Section 101(b)(1) denies him equal protection and due process of law in that Congress failed to grant a privilege status that exists for mothers and their illegitimate offspring under Section 101(b)(1)(D). It is submitted that the classifications regulating the admission of aliens adopted by Congress and contained in the Act are not subject to judicial review. Therefore,

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this case does not present a justiceable question and the Court lacks subject matter jurisdiction.

The power of Congress to regulate the admission of aliens is sui generis. It devolves from no other power, but is an attribute of sovereignty deemed entrusted solely to the legislative branch, to be delegated as it sees fit. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); Boutilier v. Immigration and Naturalization Service, 387 U.S. 118, 123 (1967).

The United States Supreme Court has consistently adhered to the proposition and held without exception that Congress is vested with the plenary power to make rules for the admission of aliens, and that the exercise of this Congressional power will not be disturbed by the judicial branch of the government without regard to the Court's opinion as to the fairness, wisdom or correctness of such rules. See Kleindienst v. Mandel, 408 U.S. 753,

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766 (1972); Harisiades v. Shaughnessy 342 U.S. 580, 592, 596-597 (1952); The Chinese Exclusion Case, 130 U.S. 581 (1889). The broad and exclusive power has been described numerous times by the Court. As Mr. Justice Frankfurter stated in Galvan v. Press, 347 U.S. 522, 531 (1954):

> "Policies pertaining to the entry of aliens ... are peculiarly concerned with the political conduct of government ... that the formulation of these policies is entrusted exclusively to Congress has become as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."

Similarly, in Harisiades v. Shaughnessy, supra, at 596-597, Mr. Justice Frankfurter, in a concurring opinion, further described the plenary power of Congress:

> "The conditions for the entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control." (Emphasis added.)

Nor have these earlier pronouncements lost any of their validity. In Kleindienst v. Mandel, supra, the Supreme

Court reaffirmed its earlier language and cited with approval the following language of the first Mr. Justice Harlan in Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895):

> "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

Mr. Justice Blackman, for the Court, referred to this plenary Congression power over the admission of aliens as a "power to be exercised exclusively by the political branches of government" and further:

> "... the Court's reaffirmations of this principle have been legion. [Foot-note citing cases omitted]. The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden' ... 'Over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."

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408 U.S. 755-766. See also Pelaez v. Immigration and Naturalization Service, 513 F.2d 303, 305 (5th Cir. 1975); Hitai v. Immigration and Naturalization Service, 343 F.2d 466 (2nd Cir. 1965), cert. denied, 382 U.S. 816 (1965), Gordon and Rosenfeld, Immigration Law and Procedure, Section 2.2. In the last mentioned treatize, the authors state that "no successful challenge has ever been made to any exercise of legislative power in the field". Id at §2.2, p. 2-13.

Plaintiff alleges in his complaint that he is entitled to have his petition on behalf of his alleged son processed and granted in the same manner as a petition by a natural mother on behalf of her illegitimate son. From the disparate treatment created by Congressional mandate the plaintiff complains that Section 101(b)(1)(D) denies him equal protection and due process of law. The plaintiff's position is untenable. Although it is not specifically stated in his complaint he is apparently charging that Section 101(b)(1)(D) violates his Fifth

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Amendment rights on the basis that the Congressional definitions contained in that section unconstitutionally based upon sex or illegitimacy. Although classifications based upon sex and illegitimacy have been condemned by the Courts in the context of domestic legislation certain such classifications have been upheld. See e.g. Labine v. Vincent, 401 U.S. 536 (1971) (Classification based on illegitimacy upheld); Khan v. Shevan, 416 U.S. 351 (1974) (Classification based on sex upheld). Despite the above it is not the function of the judiciary in considering matters relating to immigration and the admission of aliens to evaluate the propriety of granting a certain privileged status or benefits to one group of aliens as opposed to another. In Harisiades, supra at 597 the Court stated:

> ..."(W)hether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress ... But the underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens may be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American tradition ..."

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The exclusiveness and breadth of this Congressional power was again discussed by the Ninth Circuit:

> "It is firmly established that Congress has the power to exclude aliens of a particular race from the United States ..." Dunav. Immigration and Naturalization Service, 499 F.2d 856, 858 (9th Cir. 1974), cert. denied, 43 U.S.L.W. 3388 (January 14, 1975)(No. 74-321).

Although in the context of domestic legislation analogous complaints by the plaintiff might be reviewable, when viewed in the context of Congress' plenary power over immigration they are "insubstantial". See Faustino v. Immigration and Naturalization Service 302 F. Supp. 212 (S.D.N.Y. 1969) aff'd per curiam, (2nd Cir. 1970), cert. denied, 401 U.S. 921 (1971); Perdido v. Immigration and Naturalization Service, 420 F.2d 1179 (5th Cir. 1969). Although these Congressional classifications may create hardships for certain aliens seeking to enter the United States the plaintiff herein cannot rely upon the Fifth Amendment to attack and overturn these classifications. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

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United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); see also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). As stated in Wong Hing Fun v. Esperdy, 335 F.2d 657, (2nd Cir. 1964) "The Fifth Amendment does not affect, in any degree, Congress' plenary power over exclusion procedures."

As previously mentioned the denial of a preference status to certain natural fathers and their illegitimate offspring under Sections 101(b)(1) and 203 of the Act does not exclude the prospective beneficiaries from entering the United States but rather places them in the position of every other alien who has no statutorily recognized familial relation living in the United States. In sum, the statutory classification challenged here is part of a comprehensive plan adopted by Congress in its exclusive authority to prescribe the classes of aliens who may enter and remain in the United States. In the past race, age, ethnic origin, political persuasion, national origin, and sexual proclivities have all been

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to be characteristics upon which Congress could base its distinctions in treatment when regulating the entry of aliens into the United States. All were beyond judicial review and there is no reason to isolate the plaintiff's complaint and treat it differently when juxtaposed against Congressional power in immigration matters. Although administrative interpretations of the Act, and administrative policies adopted pursuant to the Attorney General's broad discretionary powers under the Act, are subject to review the instant case presents a completely distinct issue. The instant case does not challenge an agency policy as in Noel v. Chapman 508 F.2d 1023 (2nd Cir. 1975), cert. denied U.S. (October 6, 1975) or a statutory interpretation as in Nazareno v. Attorney General of the United States, 512 F.2d 936 (D.C. Cir. 1975), cert. denied U.S. (October 14, 1975). Here the plaintiff directly challenges the clear and unambiguous statutory language, not as applied, but on its face. As there is no issue of administrative policy and no issue of procedural due process, there is no basis for review and the Court must dismiss this action.

POINT II

THE CONGRESSIONAL DETERMINATION NOT TO GRANT PREFERENCE STATUS TO ILLEGITIMATE CHILDREN CLAIMING BENEFITS THROUGH THEIR NATURAL FATHERS WHILE ALLOWING SIMILAR PREFERENCES TO ILLEGITIMATE CHILDREN CLAIMING THEIR BENEFITS THROUGH THEIR NATURAL MOTHERS IS A PROPER EXERCISE OF LEGISLATIVE CLASSIFICATION OF ALIENS CONTROLLING THEIR ADMISSION

Assuming arguendo that this Court holds it has jurisdiction to review the challenged definition and classification previously described then it must find that the determination by Congress to withhold the preference status described in Section 203 of the Act from illegitimate children claiming through their natural fathers is a constitutionally permissible exercise of Congress' control over the admission of aliens.

It is well settled that an alien has no right to enter or remain in this country. Kleindienst v. Mandel, supra. And as previously mentioned an alien "may be denied entrance on ground which would be consti-

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tutionally suspect or impermissible in the context of domestic policy." Fiallo v. Levi, et al, slip. op. 74 C 1083 E.D.N.Y. November 28, 1975 (copy attached hereto). This plenary power over immigration matters does not yield and the Fifth Amendment does not provide ameliorative relief even if the Congressional classifications create hardships upon family life. See Noel v. Chapman, supra. (refusal to enjoin deportation of Western Hemisphere aliens married to lawful permanent resident aliens); Silverman v. Rogers 437 F.2d 102 (1st Cir. 1970), cert. denied, 402 U.S. 983 (1971) (refusal to enjoin deportation of alien married to American citizen despite the claim that the action was unconstitutional since it destroyed the constitutional rights of parties to live together in marriage); See also, Swartz v. Rogers, 254 F.2d 338 (D.C. Cir.), cert. denied 357 U.S. 928 (1958); Faustino v. Immigration and Naturalization Service, supra; Perdido v. Immigration and Naturalization Service, supra; Dimaren v. Immigration and Naturalization Service (S.D.N.Y. September 20, 1974) 73 Civ. 1079.

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In rejecting an almost identical constitutional attack on the Congressional definition of "child" under the Act, Judge Moore, speaking for the majority of a three judge court, stated;

> "There is no doubt that Congress can establish classifications which result in the granting of benefits to one group of individuals, and their denial to another. Unless the immigration laws in question are wholly devoid of any conceivable national purpose, or are fundamentally aimed at achieving a goal unrelated to the regulation of immigration, they are not unconstitutional encroachments on the right to equal protection of the laws." (footnotes omitted) Fiallo v. Levi, supra, at p. 7.

The Court went on to state, citing the Noel case, that there is no need to apply the test of compelling state interest in immigration cases, since alienage is not a suspect classification for the purposes of legislation regulating the admission or expulsion of aliens.

In the instant case Congress has not barred the alien visa beneficiary from immigrating into the United States. The plaintiff's alleged son may, like other aliens, immigrate under the appropriate numerical

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limitations if a visa is available to him. The status of illegitimacy itself is not an excludable characteristic. What Congress has done in Section 101(b)(1) and Section 203 of the Act is to adopt a constitutionally permissible system for the purpose of regulating the admission of aliens.

Prior to the 1957 amendments to the Act, illegitimate children and their natural parents were not eligible for the privileged status conferred on children and their parents. In 1957 Congress amended the Act to include §1101(b)(1)(D), extending privileged status to certain alien mothers of illegitimate children and to certain alien illegitimate children seeking privileged status through their relationship.

The statutory language is quite clear. Plaintiff's alleged son is unquestionably ineligible to receive privileged status. There is no need for the court to interpret the statutory language and thus legislative history. History is of no direct relevance. While Congress

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may have desired to alleviate certain hardships that it perceived flowing from the separation of mothers and their illegitimate children, it is clear that Congress perceived no similar hardships occurring in the separation of natural fathers and their illegitimate, unlegitimated, unadopted children.

Congressional concern over maintaining the family unit must not be regarded as so overriding that all other legitimate concerns with the administration of the immigration laws should be disregarded. Other concerns, such as preventing fraud and providing for efficient and prompt determinations by American consuls abroad, must also be weighed in evaluating the legitimacy of the Congressional classification.

In reviewing the constitutional basis for the legislative classification in Section 101(b)(1) the Court in Fiallo v. Levi, supra, stated:

> "However, in view of the need to establish administrative procedures abroad which can

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> process immigration applications efficiently, avoid extremely difficult problems of investigation and proof, and minimize the potential for sham claims, we cannot say that the legislative decision to exclude unwed biological fathers and their illegitimate children from the statutory definitions of parent and child is patently unreasonable."

See also Hasegawa v. Attorney General of United States, 512 F.2d 936, 940 (D.C. Cir. 1975) where the Court of Appeals, discussing the denial of "child" status to children seeking immigration benefits who were adopted after their fourteenth year, stated:

> "The avoidance of fraud was likely a reason for the limitations on adoption in the 1957 amendment. Congress could have chosen to cope with the fraud problem by providing means for investigation, but that would have imposed a substantial burden on the system."

The granting of privileged status to natural fathers and their illegitimate offspring would obviously open a fertile field for fraudulent claims. Claims of paternity long after the birth of a child would be difficult, if not impossible, to verify, cf. Gomez v. Perez, 409 U.S. 545, 538 (1973). Congress would have to be concerned with the tremendous additional burden on consuls abroad that processing and investigating these claims

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would create. On the other hand, verification of maternity is usually a good deal less difficult. In Stanton v. Weinberger, 502 F.2d 315 (10th Cir. 1974), the Court of Appeals held that, in the context of adoption and social security, "a classification designed to prevent [spurious claims] has a rational basis and is not invidious." Id. at 320. The Supreme Court in Jimenez v. Weinberger, 417 U.S. 628 (1974) and in Weinberger v. Salfi, U.S. , 43 U.S.L.W. 4985 (June 26, 1975) recognized a legitimate governmental interest in the prevention of spurious claims.

Congress was clearly concerned with the difficulties attendant upon a determination of the bona fides of a parent-child relationship when it granted the privileged status to aliens who had a parent-child relationship with citizens or permanent resident aliens. Rather than grant the privileged status to all persons who could prove that denial of the privilege of a prompt reunion with their parent or child would defeat the

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Congressional aim of maintaining or reuniting families, a difficult determination under the best of circumstances, Congress enumerated classes of persons to whom it would grant the privileged status. This removed an almost impossible burden from the Immigration and Naturalization Service and from American consuls abroad of having to determine the nature of the alleged relationship between the parent and the child and allowed for a relatively simple determination. Thus Congress granted the privileged status to all legitimate children and their parents and to all illegitimate children and their mothers, but withheld the privileged status from adopted children and their adoptive parents if the adoption took place after the child was 14, from legitimated children and their parents if the child was not in the custody of the legitimating parent at the time of legitimization or if the child was over 18 at the time of legitimization, and from step-children and stepparents if the child was over 18 at the time of the marriage creating the status of stepchild. Congress also denied the privileged status from the natural

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parents of adoptive children who sought the privileged status based solely on their biological relationship. Title 8 U.S.C. §1101(b)(1).

Similarly, Congress excluded the relationship of illegitimate child and natural father, the relationship claimed by the plaintiffs, not because such a relationship could never meet the criteria of a family unit, which it clearly could, but because, on balance, Congress concluded that it usually would not meet the criteria, particularly where there had neither been a legitimization or an adoption. Rather than require the consul or the Immigration and Naturalization Service to make a subjective determination of whether a real parent-child relationship existed, Congress opted to exclude the class. The only realistic alternative would have been to include the entire class without qualification, which would give illegitimate children greater privileges than children adopted after they are 14 and would give the fathers of illegitimate children who neither adopted nor legitimated their children greater privileges than parents who adopted

children over 14, or who became stepparents after the child became 18. In Weinberger v. Salfi, supra, the Supreme Court upheld a Congressional determination that was similarly under- and over-inclusive because, inter alia, of the expense and other difficulties of individual determination. Id., 43 U.S.L.W. at 4993. The challenged classification should similarly be upheld. Fiallo v. Levi, et al., supra.

If any justification is necessary to sustain a Congressional classification created for purposes of regulating the admission of aliens to the United States, the prevention of spurious claims and the alleviation of undue burdens on consuls abroad, both legitimate concerns, should suffice and the classification should be upheld.

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POINT III

THE FINDINGS OF THE BOARD OF IMMIGRATION APPEALS WITH RESPECT TO THE ASSERTION OF LEGITIMACY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND ENTITLED TO AFFIRMANCE BY THIS COURT

As previously mentioned Congress adopted a system for regulating the admission of aliens which is restrictive in nature. Title 8 U.S.C. §1101 et seq. The Attorney General, as the person charged with the administration of the immigration laws, has broad discretion in the implementation of the policies of those laws. Royalton College Inc. v. Clark, 295 F. Supp. 365 (Vt. 1969). By regulation the Board of Immigration Appeals pursuant to 8 C.F.R. §3.1 has the sole delegated authority to review the denial of requests for preference status such as in the case at bar.

The plaintiff herein is not entitled to have the decision of the Board reversed unless on a limited threshold review by this Court its decision is found

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to be an abuse of discretion or unsupported by substantial evidence. See Maggiore Bakery Inc. v. Esperdy, 238 F. Supp. 374 (S.D.N.Y. 1964); Flower Furniture Manufacturing Corp. v. Esperdy, 229 F. Supp. 182 (S.D.N.Y. 1962); Roubeliotis v. Immigration and Naturalization Service, 304 F.2d 453 (7th Cir. 1962). Nor is he entitled to a trial de novo on judicial review. Flower Furniture Manufacturing Corp. v. Esperdy, supra.

Plaintiff complains that the Board erred as a matter of law in holding that the beneficiary of his visa petition was not "legitimated" within the meaning of Section 101(b)(1)(c) of the Act, and that he was denied due process because the Board found as a matter of law that Kim Kok Lau was ineligible to qualify for the requested preference status. The plaintiff alleges in paragraph 5 of his complaint he has "acknowledged his paternity" of the visa petition beneficiary, and has paid for his care and support. He also alleges that since Article 15, in part, states "children born out of wedlock

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By representing that he has "acknowledged" and maintained his alleged son, the plaintiff is attempting to read into Article 15 of the Marriage Law a supplemental form of "acknowledgement" through the proof of material facts, i.e., support and maintenance, which is nonexistent in the language of Article 15. While the Chinese law may try to equalize the rights of a "legitimated" child it does not, in and of itself, make the child a "legitimate" child at birth. As the Board's decision indicates Article 15 does not state that a child born out of wedlock has any right as against the putative father unless the paternity is legally established. It is only then that Article 15 permits the illegitimate child to seek support and residence in the custody of the identified father.

On appeal to the Board the plaintiff sought to persuade that administrative tribunal by citing former administrative decisions relating to the issue of legitimation. While the Board correctly noted that these decisions would not be binding upon a legitimacy case

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deriving from the People's Republic of China, it is worthy to note that the Board in each of those cases found that substantial "legal" proof of legitimation was present (E.g. In Matter of G paternity was acknowledged at the time of birth and recorded on a birth certificate; in Matter of K paternity was acknowledged on a certificate of birth and baptism). The Board in requiring the plaintiff to "legally establish" paternity in this case was requiring no more in the way of certainty than it has in the past. This certainly conforms with the restrictive nature of Title 8 U.S.C. 1101 et seq., and prevents spurious claims of paternity. Had Congress demanded less in the nature of proof of paternity or legitimation, it would not have used the restrictive categories defined in Section 101(b)(1), but would have used a general definition involving such characteristics as care, companionship, devotion or psychological relationship to define which "children" should enter the United States on a preferred basis.

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Proof that the paternity of the alleged son has been legally established is particularly necessary in this action since it arises from a political entity with which the United States has no political relations, People's Republic of China, and therefore without a showing that legitimation has been "legally established" proof of actual filiation would be most difficult to verify by the Immigration Service or the Department of State. Nowhere are the cautionary statements by the courts regarding judicial restraint from the political conduct of government as it relates to immigration matters more relevant. See Point I supra. Therefore, this court should affirm the decision of the Board and show deference to the interpretation given by the agencies charged with administering the immigration laws. See Nazareno v. Attorney General, supra at 939-940.

CONCLUSION

Section 101(b)(1) is a constitutionally permissible classification adopted by Congress pursuant to

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its plenary power over the admission of aliens. The decision of the Board of Immigration Appeals denying the plaintiff's petition for preferred status was not an abuse of discretion and is supported by substantial evidence. The Court should therefore dismiss this action.

Dated: New York, New York

December , 1975.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for the Defendant.

THOMAS M. BELOTE,
Special Assistant United States Attorney,
Of Counsel.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

RAMON MARTIN FIALLO, An infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SCNE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, An infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, JR., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Defendants.

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OPINION AND ORDER

APPEARANCES:

JANET CALVO, Esq., New York, N.Y.
(Kalman Finkel, Morton B. Dicker, John E. Kirklin, Anita Fisher Barett, Esqs., The Legal Aid Society)
for Plaintiffs.

DOUGLAS J. KRAMER, Esq., Assistant U.S. Attorney, Brooklyn, New York (David G. Trager, United States Attorney, Eastern District of New York) for Defendants.

BEFORE: MOORE, Circuit Judge, WEINSTEIN and BRAMWELL, District Judges.

MOORE, Circuit Judge:

This is an action challenging the constitutionality of two classifications of aliens established by Congress as part of a comprehensive scheme for the admission of aliens into the United States contained in the Immigration and Nationality Act (the "Act"), Title 8 U.S.C. §1101 et seq. Plaintiffs specifically challenge the Act's definition of "parent" and "child" insofar as it excludes the relationship between unwed, biological fathers and their illegitimate children[1]. The effect of the exclusion is to subject the aliens in question to restrictive numerical quotas and labor certification requirements which are waived for individuals who qualify as parents or children, within the meaning of the Act, of American citizens and permanent residents.[2] Plaintiffs are three sets of unwed, biological fathers and their illegitimate offspring. Both the aliens excluded by this section of the Act and the American citizens or permanent residents who are these aliens' illegitimate children or biological fathers have joined as plaintiffs in this suit; their claim is that the statutory classification

is unconstitutional on its face since unwed biological fathers are excluded while unwed biological mothers are not.

A three-judge court was ordered convened, and plaintiffs have moved this Court for certification as a class action, summary judgment, and a permanent injunction. For the reasons which follow, those motions are denied, and judgment is entered for the defendant. The facts are not in dispute, and may be summarized briefly.

Ramon Fiallo, an infant and an American citizen by birth, applied - through application submitted on his behalf by his mother - to the United States Consul in the Dominican Republic to have his alien father officially declared to be his parent under the immigration laws, so that the latter might remain permanently in the United States. Ramon Fiallo's petition was rejected, the Consul stating that Fiallo senior could not be declared the parent of an American citizen since his child was illegitimate. At present, both parents are living together in this country with their child; although the father could qualify as a parent if he legitimated his son, he and the boy's mother do not wish to marry.

Cleophus Warner, a naturalized American citizen, attempted to have his illegitimate son Serge, a citizen of the French West Indies, officially declared to be his child within the meaning of the Act by filing a petition with immigration authorities in New York, so that the boy might

remain permanently with his father in this country. The petition was rejected since the boy was neither the father's legitimate nor legitimated offspring, and hence he could not meet the Act's definition of a child.

Trevor and Arthur Wilson are two brothers under twenty-one years of age who are permanent residents of the United States. After the death of their biological mother they sought to have their father, a citizen of Jamaica, officially classified as their parent so that he might qualify for permanent residency in this country. It is not clear whether their petition has already been denied, but denial is certain since the boys were never legitimated and hence their father cannot qualify as a parent under the Act.

The alien fathers and son in this action believe that their only realistic avenue of admittance to this country on a permanent basis is through classification as the parent or child of an American citizen or permanent resident. Fiallo senior has sought a labor certificate unsuccessfully in the past; Wilson senior alleges that the only job for which he is qualified - that of general handy-man - is one for which the required certificate is not granted.

Subject matter jurisdiction is conferred on this Court by section 279 of the Act, Title 8 U.S.C. §1329.

A threshold question is presented with regard to Fiallo's standing to maintain this action. The administrative

decision on which Fiallo bases this suit is the denial of his petition by the United States Consul at Santo Domingo. Decisions of consuls granting or denying a visa have been held to be immune from judicial review. See, e.g., Loza-Bedoya v. INS, 410 F.2d 343 (10th Cir. 1975). We note, however, that the petition in question here did not constitute an application for a visa, but was a preliminary declaration of immigrant status. We will not extend consular non-reviewability, insofar as that rule has been recognized, beyond the actual grant or denial of a visa. This is predicated upon our reluctance to insulate entirely the actions of any public official from judicial scrutiny, and thereby foreclose a group of plaintiffs from seeking relief in the courts. Plaintiff Fiallo, therefore, is not barred from bringing this action.

Turning to the merits, we begin with the proposition that Congress' power to make rules for the admission and expulsion of aliens is exceptionally broad.

> This Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden. Over no conceivable subject is the legislative power . . . more complete than it is over the admission of aliens.
> Kliendienst v. Mandel, 408 U.S. 753, 766, 92 S.Ct. 2576, 2583, 33 L.Ed. 2d 633 (1972) (quotation marks and citations omitted)

The limits to the exercise of this power are few, for an alien has no constitutional right to enter or remain in this country, Kliendienst v. Mandel, supra. Moreover, he may be denied entrance on grounds which would be constitutionally suspect or impermissible in the context of domestic policy, namely, race[3], physical condition,[4] political beliefs,[5] sexual proclivities,[6] age,[7] and national origin.[8]

In regulating the admission of aliens who are the spouses, parents, and children of American citizens and permanent residents, Congress has chosen to specify the kind of relationships which are, for purposes of the immigration laws, embraced within those terms. This is a perfectly proper exercise of the Congressional responsibility to admit into this country those individuals who will be desirable additions to our populace. This includes individuals who will respect our system of government[9] and who will be useful additions to our labor force,[10] as well as those whose lives reflect personal standards of conduct important to our society's sense of morality. And while the Congress' view about what kind of marital or parental relation should be encouraged in this country may differ from the individual views held by the members of the courts, it is not for the judiciary to usurp the legislative function and replace the Congressional standards with its own.

A number of courts have ruled on the question of whether, in the immigration field, Congress may constitutionally apply its own standards with respect to the status of familial relations, and we note that this power has consistently been upheld. In United States v. Diogo, 320 F.2d 898 (2d Cir. 1963), this Court held that a marriage valid under state law need not be recognized as valid under the immigration laws.

> Of course Congress may adopt a federal standard of bona fides for the limited purpose of denying immigration priorities to persons whose marriages do not meet the standard. That standard, embodied in the Congressional understanding of the terms "marriage" and "spouse" as those terms appear in the immigration statutes is, of course, the relevant standard to apply in exclusion or deportation proceedings brought under the statutory provisions appropriate. 320 F.2d at 905.

In Faustino v. INS, 432 F.2d 429 (2d Cir. 1970), cert. denied, 401 U.S. 921, 91 S.Ct. 909, 27 L.Ed. 2d 824 (1971), we held that it was not unconstitutional for Congress to permit citizen children over the age of twenty-one to bring their alien parents into this country without regard to numerical quotas, but to deny that same privilege to citizen children under that age. Accord, Perdido v. INS, 420 F.2d 1179 (5th Cir. 1969). And in an analagous situation the District of Columbia Circuit upheld the application of one aspect of the Act's restrictive definition of child to the provision of the Act granting

priority status to the sons and daughters of American citizens;[11] the effect of the holding was to deny the status of child, and hence the consequent statutory benefits, to aliens who were adopted by American citizens after their fourteenth birthdays.[12] Nazareno v. Attorney General of the United States, supra.

There is no doubt that Congress can establish classifications which result in the granting of benefits to one group of individuals, and their denial to another. Unless the immigration laws in question are wholly devoid of any conceivable rational purpose,[13] or are fundamentally aimed at achieving a goal unrelated to the regulation of immigration,[14] they are not unconstitutional encroachments on the right to equal protection of the laws.

At the request of the Court the Legal Aid Society representing the plaintiffs submitted a most able and exhaustive post-trial memorandum demonstrating via statistical tables and many treatises its thesis that the "courts are giving increasing legal recognition to the reality that unwed fathers, like mothers, have close ties to their illegitimate children." (Post-Argument Memorandum, p. 17). From these statistics and extensive bibliography counsel draw the conclusion that "the evidence leaves no rational underpinning for discriminatory treatment of unwed natural fathers and their illegitimate children, and

leaves no doubt of the patent unconstitutionality of the severe and extreme form of discrimination effectuated by the statutory provisions challenged herein." (Id. p. 21). These conclusions, plaintiffs say (Id. p. 1), demonstrate "the utter irrationality of the unwarranted conclusive presumptions effectuated by the challenged provisions. . ."

However, in view of the need to establish administrative procedures abroad which can process immigration applications efficiently, avoid extremely difficult problems of investigation and proof, and minimize the potential for sham claims, we cannot say that the legislative decision to exclude unwed, biological fathers and their illegitimate children from the statutory definitions of parent and child is patently unreasonable. Cf. Faustino v. INS, supra. For example, while the names of biological mothers routinely appear on such documents as birth certificates, this may not be the case where unmarried fathers have not acknowledged paternity officially at about the time of birth. Although such evidence would not necessarily be conclusive of one's status as a parent, nevertheless we perceive that it might be more difficult for an unrelated adult to pose as a child's mother than a child's father, where the birth certificate contains a definite name and identification of the mother only.

As a matter of law, therefore, the challenged immigration provisions are not so arbitrary or capricious as to be unconstitutional; accordingly, we conclude that plaintiffs' provocative statistics and ably documented argument, which certainly would merit Congress' attention, cannot be given weight here, lest this Court engage in the kind of policy-making activity which is properly the province of the legislative branch and not the judiciary.

Plaintiffs urge that Congress' primary purpose in exempting the parents and children of American citizens and permanent residents from quota limitations and labor certification requirements was to enable families to be together in the United States. Without question, the policy behind the statutory enactments was a benevolent one; however, we cannot accept plaintiffs' unspoken assumption that they, and not Congress, should determine who constitutes the "family" which shall be allowed to enter this country on a priority basis. The statutory language is quite clear in its exclusion of unwed fathers and their illegitimate children; the fact that Congress focused upon the type of family which it determined should have the right to emigrate en masse to our shores[15/] indicates that it may well have decided that, on balance, unwed fathers would not have such relations with their illegitimate children as would justify their being given this special exemption from the normal

immigration requirements which apply to all other individuals seeking visas for permanent residency.

Even if it be assumed arguendo that biological, unwed fathers should under all circumstances be accorded the rights of parents, plaintiffs' constitutional claim cannot prevail. The possibility of joining one's closest family in the United States is a privilege granted by statute, not a right given by the Constitution.

> There can be no doubt but that [the appellants] as unadmitted and non-resident aliens have no constitutional right to enter and remain in this country. It is equally clear that their wives as resident aliens have no constitutional right to keep them here on the theory that the integrity of the family is protected by equal protection principles.
> Noel v. Chapman, 508 F.2d 1023, 1027 (2d Cir. 1975).

The same rule has been applied by this Court when the individual seeking to challenge an alien's expulsion was the alien's United States citizen-child. Enciso-Cardozo v. INS, 504 F.2d 1252, 1253 (2d Cir. 1974); cf. Fausto v. INS, supra. As we recognized in Noel v. Chapman, supra at 1027-8, the burden of separation from one's kin which occurs when an alien relative is properly excludable under our immigration laws and the American citizen or resident determines not to leave this country in order to be with the alien, is not the equivalent of the statutory destruction of the marriage or family relationship. Certainly a dif-

ficult choice is involved, but it is not one which is forbidden by the Constitution.

Plaintiffs' final argument is that the operation of the Act's definition of parent and child works a constitutionally impermissible hardship on them. While we are not unmindful of plaintiffs' plight, we have held in the past that such incidental impact on the family as the operation of the immigration laws may have is not violative of the Constitution. Noel v. Chapman, supra; Enciso-Cardozo v. INS, supra; accord, Robles v. INS., 485 F.2d 100 (10th Cir. 1973); Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), Perdido v. INS, 420 F.2d 1179 (5th Cir. 1969). The law is at times painful to some, but it cannot on that basis alone be automatically invalidated as to all.

Consideration of the class action issue is unnecessary in the light of our decision.

Leonard P. Moore
U.S.C.J.

Henry Bramwell
U.S.D.J.

FOOTNOTES

1

The relevant section is 1101(b)(1)(2), which reads:

(1) The term "child" means an unmarried person under twenty-one years of age who is--

(A) a legitimate child; or

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred; or

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;

(E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

(F) a child, under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care which will be provided the child if admitted to the United States and who has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and his spouse who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse who have complied with the preadoption requirements,

if any, of the child's proposed residence: Provided, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection.

2

8 U.S.C. §1151(b), 8 U.S.C. §1182(a)(14).

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Dunn v. INS, 499 F.2d 856, 858 (9th Cir. 1974).

4

U.S. v. Esperdy, 277 F.2d 537, 539 (2d Cir. 1960).

5

Kliendienst v. Mandel, supra.

6

Boutilier v. INS, 387 U.S. 118, 87 S.Ct. 1563, 18 L.Ed. 2d 661 (1967).

7

Nazareno v. Attorney General of the United States, 512 F.2d 936 (D.C. Cir. 1975).

8

Faustino v. INS, 432 F.2d 429, 431 (2d Cir. 1970), cert. denied, 401 U.S. 921, 91 S.Ct. 909, 27 L.Ed. 2d 824 (1971); Hitai v. INS, 343 F.2d 466, 467 (2d Cir. 1965), cert. denied, 382 U.S. 816, 86 S.Ct. 36, 15 L.Ed. 2d 63 (1965.

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Kliendeinst v. Mandel, supra.

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See, e.g., Buckley v. Gibney, 332 F.Supp. 791 (S.D.N.Y. 1971)

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8 U.S.C. §115 (a)(1)

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This is one of the several types of individuals whom we might commonly call children, but who are excluded from the Act's definition of that term. Others excluded are married children, children over twenty-one years of age, stepchildren who were over eighteen when the marriage creating their status occurred, children who were legitimated after they were eighteen. Similarly, the mothers and fathers of these individuals are not accorded the status of parents within the meaning of the Act.

13

This Court has held that there is no need to apply the test of compelling state interest in immigration cases, since alienage is not a suspect classification for purposes of legislation regulating the admission and expulsion of aliens. Noel v. Chapman, 508 F.2d 1023, 1028 (2d Cir. 1975).

14

In this regard we note that where the Congressional purpose of any law regarding aliens is not to regulate immigration but to invidiously discriminate against American citizens, permanent residents, or already-admitted aliens, that law cannot - in contrast to the one under consideration here - withstand constitutional scrutiny. See Mow Sun Wong v. Hampton 500 F.2d 1031, 1036 (9th Cir. 1974); Ramos v. United States Civil Service Commission, 376 F.Supp. 361, 366 (D. Puerto Rico 1974); cf. Graham v. Richardson, 403 U.S. 365 , 91 S.Ct. 1848, 91 L.Ed. 2d 534 (1971).

15

Counsel for the Government persuasively suggested at oral argument that plaintiffs' position could have sobering consequences if adopted by immigration officials: an unwed mother living here could bring to the United States all of her illegitimate children, each of whom could bring over his or her biological father; each father could then bring over all of the children he has ever fathered, and there-

after each of those children could bring over his or her mother, who could then bring over all of her illegitimate children, etc., etc., etc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

RAMON MARTIN FIALLO, an infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, an infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

74 C 1083

DISSENTING OPINION

Plaintiffs,

- against -

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Defendants.

- -x

WEINSTEIN, District Judge (Dissenting):

I. Issues

The constitutionality of the definitions of "parent" and "child" in the Immigration and Naturalization Laws is challenged. Section 101(b)(1) and (2) of the Immigration and Nationality Act (Act), Title 8 U.S.C. § 1101(b)(1) and (2) (1970). Unlike mothers and their illegitimate children, fathers, and their illegitimate children, are excluded from the definition of "parent" and "child". They are therefore ineligible for certain exemptions given citizens' relatives who are trying to enter the country: citizen fathers can not have their migrating illegitimate children exempted from numerical quotas and labor certification requirements as their "immediate relatives"; citizen and permanent resident illegitimate children can not have their migrating fathers exempted from the labor certification requirement. Insofar as pertinent, the definitional provision reads:

> "(1) The term 'child' means an unmarried person under twenty-one years of age who is--
>
> (A) a legitimate child; or
>
> * * *
>
> (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;
>
> * * *

> "(2) The terms 'parent', 'father', or 'mother' mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection."

8 U.S.C. § 1101(b) (1970).

The questions presented are (1) whether a statute making it more difficult for a parent and his child -- one of whom is a citizen or permanent resident -- to live together in this country solely because of the sex of the parent and the illegitimacy of the child is valid under the Fifth Amendment; and (2) whether a federal court is without power to declare such a statute invalid because it is a part of the immigration laws. The answers should be no. The Constitutional road to equality of the sexes is open to men as well as women. Each of these plaintiffs is being deprived of a critical part of his "life . . . without due process of law." U. S. Const. Fifth Amend.; cf. id. Fourteenth Amend. ("equal protection of the laws").

Legal discrimination between men and women or legitimates and illegitimates with no rational basis is no longer tolerated. Where, as here, statutory invidious discrimination punishes American citizens by denying them

familial association, one of the most precious attributes of humanity, the courts should say what is plain: the statute is unconstitutional. The wrong to parent and to child is not reduced by characterizing the one as a "biological father", without regard for his progeny. Such disdain for filial affection is incompatible with a Constitution embodying the highest ideals of a civilized nation such as ours.

II. Facts

Plaintiffs Ramon Fiallo and Ramon Fiallo-Sone, son and father

Ramon Fiallo is a United States citizen, born in New York City in 1971. Although his father, Mr. Fiallo-Sone, was not married to his mother, his father's name appears on his birth certificate and his father has nurtured him since his birth. An American consul has informed Mr. Fiallo-Sone that he is not eligible for an immigrant visa or permanent residence status without a labor certificate, and that while the labor certificate requirement is waived in the case of fathers of citizen children, the waiver is only available if the child is legitimate issue. A foreign mother of an illegitimate citizen would have obtained the waiver.

Plaintiffs Serge Warner and Cleophus Warner, son and father

Cleophus Warner, a naturalized citizen, is the unwed father of Serge Warner, who was born in the French West

certificate, he registered as Serge's father shortly after Serge's birth, and he has acknowledged paternity. Mr. Warner has supported his son since the child's birth. In 1969 Serge, in accord with his parents' and his own desires, entered the United States to live with his father. Father and son took steps to obtain an immigrant visa and permanent residence status for Serge in 1972. The Immigration and Naturalization laws allow citizen parents to bring alien children into the United States as "immediate relatives" without regard to the applicable numerical limitation on immigrants. Mr. Warner's petition was denied on the ground that Serge was not his legitimate issue as required by statute. Had the petition been by a mother who was a naturalized citizen, or had the child been legitimate, the petition would have been granted.

Plaintiffs Trevor and Earl Wilson and Arthur Wilson, sons and father

Trevor and Earl Wilson, who are now permanent residents of the United States, were born in Jamaica in 1957 and 1959 respectively. Arthur Wilson acknowledges the boys as his illegitimate sons. He lived with them and supported them until 1968, at which time they moved to New York City

with their mother. From 1968 until 1974 Mr. Wilson maintained his relationship with his sons by visits and correspondence. He also continued to support them financially. After their mother died in 1974, the two boys asked their father to come to the United States to live with them. But Mr. Wilson was only able to stay for as long as an emergency visa allowed. Since his children are illegitimate, Mr. Wilson is unable to settle in the country without a labor certification. Were a mother in Mr. Wilson's position, or were the children legitimate, the parent would have been able to enter the country without a labor certification.

III. Law

The position of these three families illustrates the severe effects on American citizens and permanent residents from the Act's discrimination between male and female parents and between legitimate and illegitimate children in its definitions of parent and child. The government does not contend that the relationship of parent to child does not exist or that a strong emotional bond between the father and child is lacking in any of these cases. Its position is that the statute compels the discrimination.

This statute, defendant insists, is not subject to judicial review. Characterizing the classification as one of aliens for the purpose of their exclusion from the country, it contends that Congressional power to exclude aliens is unfettered. See, e.g., Chae Chan Ping v. United States, 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889); Faustino v. Immigration and Naturalization Service, 432 F.2d 429, 431 (2d Cir. 1970) (Per Curiam), cert. denied, 401 U.S. 921, 91 S.Ct. 909, 27 L.Ed.2d 824 (1971).

But this is not a simple case of classifying aliens for the purpose of preferring some over others for entry. Rather, Congress has hinged immigrants' access to this country on their relationship to citizens and permanent residents. The question thus becomes whether a Congressional classification of citizens and permanent residents which severely disadvantages them may escape traditional constitutional scrutiny merely because it is set in alienage legislation.

If the classification were based on race, rather than gender or legitimacy, the court's power would be no different. Were Blacks, for example, excluded from the list of those American citizens who could bring in their

relatives without regard to quotas, no court would let the statute stand. The Constitution, and in particular, the Fifth Amendment, protects citizens from abusive or discriminatory government action. Packaging a discriminatory classification of citizens in alienage legislation can not insulate it from judicial scrutiny.

There is ample Supreme Court precedent for intervention when enforcement of the Act burdens citizens' constitutional rights. United States v. Brignoni-Ponce, U.S. , 95 Sup.Ct.2574, L.Ed.2d (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 273 n.5, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973). See also, Burrafato v. United States Dept. of State, F.2d (2d Cir. 1975) (dicta). The Court has recognized procedural due process and Fourth Amendment limitations on the government's exclusion and expulsion of aliens. See, e.g., Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50, 70 S.Ct. 445, 454, 94 L.Ed. 615 (1950); Kwock Jan Fat v. White, 253 U.S. 454, 459, 464, 40 S.Ct. 566, 568, 570, 64 L.Ed. 1010 (1920); Kaoru Yamataya v. Fisher, 189 U.S. 86, 100, 23 S.Ct. 611, 614, 47 L.Ed. 721 (1903): cf. Lennon v. INS F.2d (2d Cir. 1975).

When courts have been faced with challenges to other sections of the Act which classify aliens in terms of their relationship to citizens, they have not shrunk from traditional equal protection analysis. See Perdido v. Immigration and Naturalization Service, 420 F.2d 1179, 1181 (5th Cir. 1969); Faustino v. Immigration & Naturalization Service, 302 F.Supp. 212, 215 (S.D.N.Y. 1969), aff'd, 432 F.2d 429 (2d Cir. 1970), cert. denied, 461 U.S. 921, 91 S.Ct. 909, 27 L.Ed.2d 824 (1971). Cf. Noel v. Chapman, 508 F.2d 1023, 1026-9 (1975).

So blatant a discrimination on the basis of gender and legitimacy is seldom found in modern statutes. Illegitimacy as a basis for denial of rights available to legitimates has been repeatedly struck down as invidious and lacking in rational basis. See, e.g., Jiminez v. Weinberger, 417 U.S. 628, 632, 94 S.Ct. 2496, 2499, 41 L.Ed.2d 363 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 620-621, 93 S.Ct. 1700, 1701, 36 L.Ed.2d 543 (1973) (Per Curiam); Gomez v. Perez, 409 U.S. 535, 538, 93 S.Ct. 872, 875, 35 L.Ed.2d 56 (1973) (Per Curiam); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 175-176, 92 S.Ct. 1400, 1406-1407, 31 L.Ed.2d 768 (1972); Glona v.

American Guaranty and Liability Insurance, 391 U.S. 73, 76, 88 S.Ct. 1515, 1517, 20 L.Ed.2d 441 (1968); Levy v. Louisiana, 391 U.S. 68, 70-72, 88 S.Ct. 1509, 1510-1511, 20 L.Ed.2d 436 (1968); Tanner v. Weinberger, F.2d (6th Cir. 1975). Gender classifications have also been treated as invalid. See, e.g., Turner v. Dept. of Employment Security, U.S. , Sup.Ct. , L.Ed.2d (1975); Weinberger v. Wiesenfeld, U.S. , 95 S.Ct. 1225, 43 L.Ed. 2d 514 (1975); Stanton v. Stanton, U.S. , 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); Ginsburg, Gender and the Constitution, 44 U.Cinn. L. Rev. 1 (1975).

The legislative history and the statutory scheme leave no doubt that the exclusive purpose of Congress was to maintain or reunite family units which include United States citizen or permanent resident members. Not a shred of evidence has been produced to support the government's claim that the statutory purpose was to prevent spurious paternity claims by unwed natural fathers. As one of the provision's co-sponsors put it: "This bill is praiseworthy in its fundamental purpose --

to reunite families." 103 Cong. Rec. 15497 (1957) (remarks of Senator Pastore). See also, H.R.Rep. No. 1199, 85th Cong., 1st Sess. 7-8 (1957); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 29 (1952); 1957 U.S. Code Cong. & Ad. News 2020-2021; 103 Cong. Rec. 16719 (1957) (remarks of Senator Kennedy); 103 Cong. Rec. 16307 (1957) (remarks of Representative Rodino); Immigration Service v. Errico, 385 U.S. 214, 219-220 and n. 9, 87 S.Ct. 473, 477-478, 17 L.Ed.2d 318 (1966); Nation v. Esperdy, 239 F.Supp. 531, 534-535 (S.D.N.Y.1965). The courts must distill the general legislative purpose from the legislative history, particularly where it supports a reasonable non-sexist interpretation. Weinberger v. Wiesenfeld, U.S. , , 95 S.Ct. 1225, 1233-35, 43 L.Ed.2d 514 (1975). In view of the Congressional purpose to reunite families, there is no rational basis for the statutory classification denying the parent-child status to unwed natural fathers and their illegitimate children while automatically granting it to persons in other family relationships.

Even if Congress were motivated by a desire to discriminate against men and illegitimates in a way harmful to American citizens, the statute could not stand.

It is firmly established that a natural parent, whether father or mother, and a child, whether legitimate or not, have fundamental, constitutionally protected interests in mutual companionship and a life together.

> "The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), and '[r]ights far more precious . . . than property rights,' May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953)."

Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972). See also, Weinberger v. Salfi, U.S. , 95 S.Ct. 2457, L.Ed.2d (1975); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 169, 92 S.Ct. 1400, 1403, 31 L.Ed.2d 768 (1972); Levy v. Louisiana, 391 U.S. 68, 71, 88 S.Ct. 1509, 1511, 20 L.Ed.2d 436 (1968).

> "It is no less important for a child to be cared for by its . . . parent when that parent is male rather than female. And a father, no less than a mother, has a

> constitutionally protected right to the "companionship, care, custody, and management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection.' Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972)."

Weinberger v. Wiesenfeld, U.S. , , 95 S.Ct. 1225, 1235, 43 L.Ed.2d 514 (1975).

Courts now recognize that unwed fathers, like mothers, often have strong ties of affection to their illegitimate children and desire a continuing relationship with them. See, e.g., Miller v. Miller, 504 F.2d 1067 (9th Cir. 1974) (Per Curiam) (statute permitting adoption without notice to natural father of illegitimate unconstitutional); People ex rel. Slawek v. Covenant Children's Home, 52 Ill.2d 20, 284 N.E.2d 291 (1972) (statute precluding father of illegitimate from asserting right to child and denying custody unconstitutional); In Re Mark T., 8 Mich. App. 122, 154 N.W.2d 27, 35 (Ct. App. 1967) (custody of illegitimate child awarded to father after mother's release of child for adoption) and cases cited 154 N.W.2d at 33 n. 7, 154 N.W.2d at 35 n. 13; R. v. F., 113 N.J.Super. 396, 273 A.2d 808 (Juv. & Dom.

Rel. Ct. 1971) (denying father and his natural child of right to see each other deprives them of equal protection); Application of Juan R., (N.Y.Fam.Ct.), in N.Y.L.J., Oct. 28, 1975, at 1, col. 3 (putative father who has established paternity may bring action to acquire visiting rights without litigating custodial issues); Stone v. Chip, 68 Misc. 2d 134, 326 N.Y.S.2d 520 (Fam.Ct. 1971) (criticizing rule that mother should have child absent proof she is unfit); Conley v. Johnson, 24 N.C.App. 122, 210 S.E.2d 88 (Ct.App. 1974) (court may order visitation rights for father of illegitimate despite mother's objection); Hammack v. Wise, 211 S.E.2d 118, 121 (W. Va. 1975) (father awarded custody of illegitimate child); State ex rel. Lewis v. Lutheran Social Services, 59 Wisc. 2d 1, 207 N. W. 2d 826 (1973) (father of illegitimate

must be given a hearing on termination of his parental rights); K. Davidson, R. Ginsburg and H. Kay, "Text Note: Illegitimacy and Sex Based Discrimination," Sex Based Discrimination 309-329 (1974); Note, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581 (1972).

State legislatures are systematically revising laws in order to expand the parental rights of unwed fathers. See, e.g., Fla. Stat. Ann. § 63.062 (1974); Hawaii Rev. Laws § 578-2 (Supp. 1974); S.H. Ill. Ann. Stat. ch. 4, §§ 9.1-1E, 9.1-8, 9.1-12a (1975); Burns Ind. Stat. Ann. § 31-3-1-6 (Supp. 1975); Me. Rev. Stat. Ann. § 532 (Supp. 1975); Mich. Comp. Laws Ann. § 710.3a (Supp. 1973); Minn. Stat. Ann. §§ 259.24, 259.26, 259.261 (Supp. 1975); N.D. C.C.A. § 14-15-20 (1971); R.I. Gen. Laws § 15-7-5 Supp. 1974); Utah Code Ann. § 78-30-4 (Supp. 1975); Va. Code § 63.1-225 (Supp. 1975); Wash. Rev. Code Ann. §§ 26.32.030, 26.32.085, 26.24.190, 26.28.110 (Supp. 1974); Wisc. Stat. Ann.ch. 263, §§ 48.02 (ii), 48.42, 48.02, and 48.425 (Supp. 1975).

This clear trend is consonant with national policy recognized by Congress in its adoption of the Equal Rights Amendment and in its enactment of a series of other statutes designed to overcome outmoded concepts of sex discrimination. See, e.g., Proposed Constitutional Amendment, S.J. Res. 9, 92d Cong., 1st Sess., 118 Cong. Rec. 9568 (1972), H.R. J. Res. 208, 92d Cong., 1st Sess., 117 Cong.Rec.35782 (1971); Civil Rights Act of 1964, Title VII, 42 USC § 2000(e)-5 (1974), Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1965).

The fact that Congress has not yet had the opportunity to winnow through the enormous federal statutory materials to carry out its clear present policy gives added force to the argument that the vestigial remainder of such discrimination embodied in the Act should be closely reviewed by the courts.

Social science literature and empirical studies illustrate why courts, as well as legislatures, no longer allow legislative exclusion of fathers of illegitimates from statutory benefits. Such discrimination is based on an archaic and overbroad stereotype of unwed fathers. Most

pregnancies result from exclusive long-term relationships between the father and mother. M. Sauber and E. Rubinstein, Experiences of the Unwed Mother as a Parent 27 (1965); Herzog, "Some Notes About Unmarried Fathers," 1966 Child Welfare 194; Pope, "Unwed Mother and Their Sex Partners," 29 J. of Marriage & the Family, 555, 558 (1967). Many fathers not only continue the relationship with the mother after the child's birth, Sauber and Rubinstein, supra, at 53, but also demonstrate genuine interest in and concern for their children. R. Pannor, F. Massarik, and B. Evans, The Unmarried Father 92 (1971); Chaskel, "Changing Patterns in Services for Unmarried Parents," 49 Social Casework 3, 10 (1968); Wessel, "A Physician Looks at Services for Unmarried Parents," 49 Social Casework 11, 12 (1968).

Even those fathers not living with their children assume many of the functions of fatherhood vital to the well-being of children, including financial and emotional support. One statistical study found that between 59% to 83% of these fathers contribute money for their child's expenses and approximately 70% visit their children. Ewer, 1971 Maternal and Child Health Service, Project H-214-2, Characteristics of AAPP Unwed Fathers -- A Descriptive Study 2, Table 33

The challenged provisions, by excluding only fathers and their illegitimate children from statutory benefits, are based upon an irrebuttable presumption that fathers do not have close family ties with their illegitimate offspring, a presumption belied by the statistical evidence, sociological evaluation of family life, and the facts in the three cases before us. Such a presumption without basis in fact is invalid. See, e.g., Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); United States Dept. of Agriculture v. Murry, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767 (1973); Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973). Cf. Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974).

Whatever assumed basis there may once have been for such sexist presumptions no longer exists. Rationality must be viewed in the light of current knowledge. See Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970).

Even if we accepted the government's contention that the natural fathers of illegitimate children were

singled out by Congress to prevent spurious claims, the statutory scheme is not rationally related to that end. See Jiminez v. Weinberger, 417 U.S. 628, 634-6, 94 S.Ct.2496, 2500-01, 41 L.Ed.2d 363 (1974), where the Court invalidated provisions of the Social Security Act denying children's insurance benefits to a subclass of illegitimate children because the structure of the statute was not reasonably related to the purported purpose, prevention of spurious claims.

Paternity or maternity must be claimed and proven in cases involving legitimate children, legitimated children, step-children and illegitimate children to the satisfaction of immigration and consular officials. The burden of proof of any familial relationship is on the United States citizen or permanent resident and the alien relative. Immigration authorities may require birth certificates, marriage certificates, baptismal certificates, school records, census records, affidavits, letters, photographs, remittances, proof of custody, proof of support, a blood test, personal testimony, and other evidence. 8 C.F.R. § 204.2 (1975). The potential for spurious claims is as great for those included in the statutes' definitions of parent and child as for illegitimate

children and their fathers. Women claiming to be mothers of illegitimate children and men claiming to be fathers of legitimated, legitimate, or illegitimate children in a step-child situation, and their respective children, would have as much difficulty or ease in presenting fraudulent proof as would a man claiming to be the father of an illegitimate child and his child.

And yet, quota restrictions are waived in the case of a step-child or legitimated child if paternity is proven, but a conclusive statutory presumption denies any opportunity of proof in the case of an illegitimate child. A conclusive presumption supposedly established to prevent spurious claims can not be upheld when the potential for fraud is similar for the excluded group and for groups receiving the statutory benefits. Jiminez v. Weinberger, 417 U.S. 628, 636-637, 94 S.Ct. 2496, 2501-02, 41 L.Ed. 363 (1974). Cf. U. S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct.2821, 37 L.Ed.2d 782 (1973); Vlandis v. Kline, 412 U.S. 441, 453-4, 93 S.Ct. 2230, 2237, 37 L.Ed.2d 63 (1973); Gomez v. Perez, 409 U.S. 535, 538, 93 S.Ct. 872, 875, 35 L.Ed.2d 56 (1973); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Glona v. American Guaranty & Liability Insurance Co.,

391 U.S. 73, 76, 88 S.Ct. 1515, 1517, 20 L.Ed.2d 441 (1968). This rigid presumption must be replaced by "more individualized means" of determining the family relationship. Turner v. Dept. of Employment Security, U.S. , , S.Ct. , L.Ed.2d (1975).

Practically speaking, the government's contention that the restrictive definition of parent is necessary to prevent spurious claims is nothing more than a plea on behalf of administrative convenience. But it has been clear for some time now that a scheme built upon administrative convenience cannot stand when invidious discrimination results. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 690, 93 S.Ct. 1764, 1772, 36 L.Ed.2d 583 (1973).

IV. Conclusion

Plaintiffs' request for summary judgment in their favor should be granted.

Dated: Brooklyn, New York
November 28 1975.

Jack B. Weinstein
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHIN LAU, Plaintiff, -v- MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice, Defendant.	NOTICE OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT 75 Civ. 1237 (LFM)

S I R S :

PLEASE TAKE NOTICE that upon the annexed General Rule 9(g) statement of Edward J. Ennis, attorney for plaintiff, and upon all papers filed and proceedings had herein, the undersigned will move this Court on submission of the papers filed herein before the Hon. Lloyd F. MacMahon, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment for the plaintiff and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
December 11, 1975

To United States Attorney
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHIN LAU, Plaintiff, -v- MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice, Defendant.	PLAINTIFF'S GENERAL RULE 9(g) STATEMENT 75 Civ. 1237 (LFM)

1. Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9(g) of the General Rules for the United States District Court for the Southern District of New York, the plaintiff, by his attorneys, Edward J. Ennis and Benjamin Gim, in support of his cross motion for summary judgment adopts and submits the statement of facts contained in defendant's Rule 9(g) statement in support of defendant's motion for summary judgment. Plaintiff's attorneys believe and assert that there is no genuine issue of fact to be tried.

2. In addition to the statement of material facts in defendant's General Rule 9(g) statement incorporated by reference herein, plaintiff submits the following additional facts concerning which there is no issue to be tried:

A. A copy of the English language translation of "The Marriage Law of the People's Republic of China" promulgated on May 1, 1950 and published by the Foreign Language Press

B. The latest and most authoritative treatise on Chinese family law is M. J. Meijier's Marriage Law and Policy in the Chinese People's Republic (Hong Kong 1971), copy to be submitted to the Court as plaintiff's Exhibit 2. The above cited work includes the following comments in respect of Article 15 of the Chinese marriage law.

a. (p. 73) "Article 15 provides expressly that illegitimate children shall enjoy the same rights as those born in wedlock, which means that they have the right to be brought up and educated and the right to inherit from both parents, plus, of course, the corresponding duty to support the parents. The question to which family they are to belong is probably to be decided between tje mother and father."

b. (p. 208) "The Chinese Marriage Law has, contrary to its counterpart in the U.S.S.R. retained the institution of the paternity suit in case of illegitimate children. This is clearly expressed in Article 15. The proof may be furnished by the mother, by other witnesses, or by material evidence. The natural father may be forced by law to pay the costs of bringing up and educating the child. The important point is that the child has the status of a child born in wedlock. This is to say that Article 13 and 14 are applicable, and that the stepfather, in the event of the woman marrying somebody else, is also bound by Article 16."

c. (p. 227) "The fundamental meaning of Article 20 is that the ties between parents and children are not based on the marriage of the parents but on the blood relationship existing between them. This is strengthened by Article 15, which provides that children born out of wedlock shall enjoy the same rights as those born of a legal marriage. The relationship is based on descent."

Edward J. Ennis
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHIN LAU Plaintiff, -v- MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice, Defendant.	:	75 Civ. 1237 (LFM)

PLAINTIFF'S BRIEF

Preliminary Statement

Both parties have moved for summary judgment to review a decision of the Board of Immigration Appeals of the United States Department of Justice denying plaintiff's petition for a preference immigration visa status for his adult son born in China out of wedlock to facilitate the son's immigration to the United States to join his father.

Questions Presented

I. A. Whether the son, born out of wedlock, is nevertheless legitimate under applicable Marriage Law of the People's Republic of China.

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B. Whether the son, legitimate under Chinese Law, is "legitimate" within the meaning of §101 (b)(1)(A) of the Immigration and Naturalization Act of 1952 (8USC1101(b)(1)(A)).

II. Whether even if the son is "illegitimate" within the meaning of the 1952 Act nevertheless the requested preference status should be granted on the ground that limiting benefits of illegitimate children to those sought through the natural mother, excluding those rights sought through the natural father, is unconstitutional denial of equal protection of law guaranteed to plaintiff by the due process clause of the Fifth Amendment.

Statute Involved

§101(b)(1) (8USC1101) of the Immigration and Naturalization Act of 1952 provides in part: (1) The term "child" means an unmarried person under twenty-one years of age who is --

(A) a legitimate child

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;

§203 (a)(2) (8USC1153) of the Immigration and Naturalization Act of 1952 provides as follows:

Visas shall next be made available, in a number not to exceed 20 per centum of the number specified in section

201(a)(ii), plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are the spouses, unmarried sons or unmarried daughters of an alien lawfully admitted for permanent residence.

Facts

The undisputed facts set forth in the General Rule 9(g) statements annexed to the cross motions for summary judgment are as follows:

Plaintiff, CHIN LAU, is a 47 year old native of the People's Republic of China, who first entered the United States as a lawful immigrant in 1966 and he is a lawful permanent resident of the United States. In 1973 he married in New York City and is presently married to Rose Cheung Lau, a permanent resident alien. This is plaintiff's first and only marriage and there are no children of this marriage.

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52
14

Beginning in 1947 in China plaintiff cohabited with but did not marry Chin Dung You. They have two children, a daughter, Yee Sheung Lau, born in China on October 29,1948, and a son Kim Kok Lau, born in China on June 16, 1952. Both children continue to live with plaintiff's mother in China. Since their birth plaintiff has acknowledged his paternity of his said daughter and son and has paid for their care, maintenance and support.

On September 12, 1973 plaintiff filed with defendant a petition for grant of preference status to his son, Kim Kok Lau, preparatory to the son's emigration from China to the United States to join the plaintiff (as provided in §203(a)(2) and §204 of the Immigration Naturalization Act of 1952, 8 USC §1153(a)(2) and §1154(a) and the applicable regulations 8 CFR Part 204).

Chinese Family Law

Article 15 of "The Marriage Law of the People's Republic of China" provides as follows:

> "Children born out of wedlock enjoy the same rights as children born in lawful wedlock. No person is allowed to harm them or discriminate against them.
>
> Where the paternity of a child born out of wedlock is legally established by the mother of the child or by other witnesses or material evidence, the identified father must bear the whole or part of the cost of maintenance and education of the child until the age of 18.
>
> With the consent of the mother, the natural father may have custody of the child.

With regard to the maintenance of a child born out of wedlock, if its mother marries, the provisions of Article 22 apply."

The latest and most authoritative treatise on Chinese family law is M.J. Meijier's Marriage Law and policy in the Chinese People's Republic (Hong Kong 1971), copy to be submitted to the Court in this action. Dr. Meijier is a recognized scholar and author on Chinese family law. The above cited work includes the following comments in respect of the above quoted Article 15:

a. (p.73) "Article 15 provides expressly that illegitimate children shall enjoy the same rights as those born in wedlock which means that they have the right to be brought up and educated and the right to inherit from both parents, plus, of course, the corresponding duty to support the parents. The question to which family they are to belong is probably to be decided between the mother and father."

b. (p.208) "The Chinese Marriage Law has, contrary to its counterpart in the U.S.S.R. retained the institution of the paternity suit in case of illegitimate children. This is clearly expressed in Article 15. The proof may be furnished by the mother, by other witnesses, or by material evidence. The natural father may be forced by law to pay the costs of bringing up and educating the child. The important point is that the child has the status of a child born in wedlock. This is to say that Article 13 and 14 are applicable, and that the stepfather, in the event of the woman marrying somebody else, is also bound by Article 16."

c. (p.227) "The fundamental meaning of Article 20 is that the ties between parents and children are not based on the marriage of the parents but on the blood relationship existing between them. This is strengthened by Article 15, which provides that children born out of wedlock shall enjoy the same

rights as those born of a legal marriage. The relationship is based on descent."

Administrative Decisions Below

On February 28, 1974 defendant rendered a decision and order denying plaintiff's petition on the ground that plaintiff's son, Kim Kok Lau, was illegitimate and no evidence had been submitted that he "has been legitimated".

On plaintiff's appeal from the defendant's order and decision pursuant to 8 CFR Section 3.1(b)(5), the Board of Immigration Appeals of the United States Department of Justice on October 23, 1974 rendered a decision and opinion: (1) that there was no evidence in the record that paternity "has been legally established in compliance with Article 15 of the Marriage Law of the People's Republic of China"; (2) that the Board could not construe the statute, Section 101(b)(1)(D) of the Act which expressly includes within the definition of "child" an illegitimate child claiming a benefit through "its natural mother", as including an illegitimate child claiming a benefit through its natural father; and (3) that the Board lacked authority to hold the statute unconstitutional as denying equal protection and due process of law to natural fathers and their children.

Argument

If the son is legitimate under applicable Chinese law and therefore legitimate within the meaning of the immigration statute the petition for preference status should be granted on that ground. If not the Court reaches the second question of the constitutionality of denying benefits to a resident alien father of a son born out of wedlock which are granted to the mother of such a son. Such discrimination against the father is unconstitutional and the benefit of the preference status should be extended to the father and son on that basis.

The plaintiff submits that both of these questions may be decided on the motion for summary judgment. The second question of course is a pure question of law of the constitutionality of the statutory provision denying an important benefit to a natural father which is granted to a natural mother. The first question, whether under Chinese Family Law the son of the plaintiff is a legitimate child although born out of wedlock, although a question of foreign law is appropriate for summary judgment because presented on the basis of the agreed English translation of the Chinese statutory provisions and the commentary in the English language of a recognized expert in Chinese law, Dr. M.J. Meijier.

I

The Beneficiary, though born out of wedlock, is under Article 15 of the Marriage Law of the People's Republic of China the legitimate son at birth of the petitioner, Lau Chin.

In determining whether a particular beneficiary is a legitimate child of the petitioner, "the law to be followed is the law of the petitioner's domicile at the time when the question arose, namely the birth of the beneficiaries". Matter of Kwan 13 I&N Dec. 302,305. Article 15 of the Marriage Law of the Chinese People's Republic provides that "children born out of wedlock enjoy the same rights as children born in wedlock. No person is allowed to harm them or discriminate against them." In clear unambiguous language under the law of the place of the beneficiary's birth, he has the same legal status as an in wedlock child, namely legitimate at birth and eligible for 2nd preference status under the provisions of 8 USC 1153(a)(2).*

* Although the terms "sons" and "daughters" are not statutorily defined in immigration law, the Board of Immigration Appeals has held that the terms "sons" and "daughters" must come within the confines of the definition of "child", as provided in 8 USC 1101 (b)(1). In respect of adopted children a Court has affirmed this view. Nazareno v The Attorney General 512 F 2d 936 (C.A.D.C.) Under Subsection (A) of 8 USC 1101(b) the term "child" includes a "legitimate child" and under Subsection (C) a child legitimated under the laws of the child's residence or domicile, if the legitimation takes place before the child reaches the age of 18 and the child is then in the legal custody of the legitimating parent or parents.

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In denying immigration benefits for this beneficiary, the Board, following Matter of Lo, Interim Decision 2209 (B.I.A. 1973), relied on the second paragraph of Article 15, which provides that in the case of a child born out of wedlock if the paternity "is legally established" by the mother or by "other witnesses or material evidence", the identified father must bear in whole or in part the cost of maintenance and education of the child. The Board seized the words "legally established" and summarily dismissed petitioner's appeal on the grounds that the paternity of the beneficiary had not been "legally established" in accordance with Article 15, without articulating in any manner whatsoever what it deemed was required to have paternity "legally established". The Board reserved the right to determine whether, once paternity was legally established, such a determination was legally sufficient for legitimation within the meaning of the immigration laws.

The tone of the Board's decision in this and in the Lo case manifests a predetermination to erect insurmountable barriers to block immigration privileges for out of wedlock children born in China. By failing conspicuously to articulate the criteria for "legally establishing" paternity, the Board leaves itself room to fashion on an ad hoc basis grounds for denying visa petitions in such cases no matter what paternity proof a petitioner may offer.

Then, in the event this defense of legal establishment is pierced, the Board will have a fall back position of holding that even if the paternity is "legally established", it is still not "legitimation for immigration purposes".

The Board, by an out of context reading of the second paragraph of Article 15 has without warrant engrafted a condition subsequent of paternity establishment to the first paragraph which unequivocally equalizes the legal status of in and out of wedlock children. The second paragraph concerns the maintenance and care, and not the legal status of out of wedlock children by autnorizing paternity suits where paternity is contested. This is the interpretation of the noted authority on Chinese family law, M. J. Meijer, in Marriage Law and Policy in the Chinese People's Republic (1971) hereinafter referred to as (Meijier), page 208 where he states that the Chinese Marriage Law "has, contrary to its counterpart in the U.S.S.R., retained the institution of the paternity suit in the case of illegitimate children. This is clearly expressed in Article 15."

Common sense tells us, in the context of this statute, children are either in wedlock or out of wedlock. If we follow the reasoning of the Board to its logical conclusion, what is the status of an out of wedlock child who is not able to "legally establish" paternity? One can conceive of a number of situations

where it may not be possible to establish paternity, including the case of a promiscuous mother who may not know herself who is the father of her child. Given the overriding purpose of the statute which is to remove the unfair stigma of illegitimacy and the consequent loss of rights from the out of wedlock child, isn't the ameliorative aim of the statute frustrated by such a construction? The only sensible construction is the obviously plainly read one, namely that the second paragraph concerns paternity actions for support. If paternity cannot be proved against a claimed father, he cannot be compelled to support the child, but this failure of proof does not affect the legal status of the out of wedlock child which is that fully equal to an in wedlock child.

The contention that the paternity action proceeding in the second paragraph of Article 15 does not in any way qualify or diminish the fact that the first paragraph of the statute makes all out of wedlock children legitimate at birth, finds support in Meijier (page 208) as he states whatever the results of the paternity action, "the important point is that the child (out of wedlock) has the status of a child born in wedlock". The plain thrust of the statute is to prohibit discrimination between children, whether out of wedlock children, adopted children or stepchildren because these children are "the revolutionaries of

the future and are not responsible for the mistake of their parents" (page 208).

The Board has overlooked the fact that one of the principal aims in the history and development of the Chinese Marriage Law was to abolish legal distinctions for children based on the factor of marriage of their parents.

Beginning with the establishment of the Soviet Republic of China in the Province of Kiangsi in 1931, the Chinese Communists, considering the protection of women and children to be of primary importance in the system of the Chinese family, promulgated the Marriage Regulations of 1931. Meijier (page 47) states "a very important provision, embodying one of the fundamental principles of the regulations is found in Article 21: The equalization of the positions of illegitimate and legitimate children. In fact, the duties of the natural father towards illegitimate children were exactly the same as those of the father toward legitimate children after divorce if the children were being raised by his wife (Article 14)."

The Kiangsi regulations were followed by the Marriage Law of the Chinese Soviet Republic of April 8, 1934, which as Meijier (pages 50,51) observes continues "the principle of equalization of legitimate and illegitimate children expressed

in Article 19. Illegitimate children, this time, expressly called by the traditional Chinese name of 'szu-sheng tzu', 'shall enjoy all the rights granted to legitimate children by this Marriage law'. For the purpose of the Law, there was no difference between children born within or out of wedlock" (Meijier, page 50).

The Marriage Law of 1950 continued to reflect the concept of the family as a socialist cell, having an important function in the new society. "It is a family based on marriage as well as on descent. Article 15 provides expressly that illegitimate children shall enjoy the same rights as those born in wedlock, which means that they have the right to be brought up and educated and the right to inherit from both parents, plus, of course, the corresponding duty to support the parents". (Meijier, page 73).

Commenting on Article 20 of the Chinese Marriage Law concerning the duty to support and educate children after divorce, Meijier elaborates: "the fundamental meaning of Article 20 is that ties between the parent and children are not based on marriage but from the blood relationship existing between them. This is strengthened by Article 15, which provides that children born out of wedlock shall enjoy the same rights as those born of a legal marriage. The relationship is based on descent". (see page 227).

Thus, the Marriage Law in its various evolutionary stages has consistently sought to erase the stigma of illegitimacy from

out of wedlock children by declaring them legitimate at birth. Such a forward looking approach is by no means unique to China. California, under Section 4453 of the Civil Code, provides that the issue of a marriage which is void or annulled or dissolved by divorce is legitimate. Matter of Sandin-Nava, Interim Decision 2134 (BIA 1972) involved a question of the legitimacy of Sandin-Nava's child born in California from a second marriage which was unquestionably bigamous. Despite the fact of the child's "birth out of wedlock", the Board upheld the Special Inquiry Officer's ruling that the child was by California statute legitimate at birth and legitimate under the provisions of 8 USC 1101(b)(1)(A) of the Immigration Act. In Matter of Sinclair, 13 I&N Dec.613,614, Article 58 of the Panamanian Constitution provided:

> "Parents have the same duties with respect to their children born out of wedlock as they do toward children born in wedlock. All children are equal before the law and have the same rights of inheritance in intestate succession."

Observing that this Article "abolished the old distinctions between legitimacy and illegitimacy by providing for the equal treatment of all children," the Board held that if the petitioner father acknowledged paternity it was sufficient to establish the beneficiary as "his legitimate child", both as to Panamanian law and under the Immigration Act.

If the Board can hold that the Panamanian law, which is similar to Article 15 of the Chinese law in wording and scope, can constitute an out of wedlock child legitimate at birth, one can only view with dismay the Board's labored attempt to distort the Marriage Law of China so as to ground a denial of immigration privileges for such a child born in China.

Even if we were to assume merely for the sake of argument that the second paragraph of Article 15 concerning establishment of paternity is a necessary condition precedent to legitimizing at birth of an out of wedlock child, such requirement has been more than complied with.

China was and still is a country which maintains no governmental agencies to issue birth certificates for its more than 800 million inhabitants. Under long established administrative practice of the Immigration and Naturalization Service, the government has accepted in lieu of birth certificates in Chinese cases pedigree affidavits of relatives and neighbors, coupled with secondary documentary evidence such as letters, family photographs, evidence of support for the purpose of proving family relationship (see Matter of Chin, Interim Decision 2151 (BIA 1972). Petitioner submitted his affidavit to which was attached a family picture of himself, his mother, the beneficiary, the beneficiary's natural

mother and his elder sister taken when the beneficiary was only two years of age. Also submitted were an affidavit from the petitioner's first cousin and an affidavit of a 70 year old woman from a neighboring village who had known petitioner since he was a child, both in China at the time of the beneficiary's birth, attesting to their personal knowledge that the petitioner was the father of the beneficiary. Petitioner's first cousin also confirmed that the petitioner was unable to marry beneficiary's mother because of his father's opposition. Petitioner also submitted evidence that he lived with the beneficiary and supported him from the time of his birth until he left to emigrate to the United States in 1966. In addition, petitioner presented a legal opinion from the Library of Congress which set forth that out of wedlock children in China have the same legal status as an in wedlock child.*

* Although the Board in the present case cavalierly dismisses the Library of Congress opinion, stating that the Board, not the Library of Congress, must make the ultimate interpretation of foreign statutory provisions in immigration cases, the Board has relied almost exclusively in the past in other cases on the Library on Congress in interpreting foreign law. Matter of Sinclair, 12 I&N 613; Matter of Zapletalova, 12 I&N Dec. 258,259; Matter of Boghdadi, 12 I&N Dec. 666,667; Matter of Chong, 13 I&N Dec. 45,46,47; Matter of Kim, Interim Decision 2258 (BIA 1974); Matter of K, 8 I&N Dec. 73,74; Matter of Chojnowski, 11 I&N Dec. 287,288; Matter of Jancar, 11 I&N Dec. 365,366.

Assuming that paragraph 2 of Article 15 requires establishment of paternity in order for the child to be declared legitimate, it is submitted the petitioner has "established" the paternity of his child, not only by his own acknowledgment of paternity, but "by other witnesses or material evidence".

The Board's adamant refusal to recognize the legitimacy of out of wedlock Chinese children becomes incomprehensible in light of its contrasting liberal interpretation of the legitimacy statutes of China's political counterparts in such Eastern European countries as Hungary, Poland and Yugoslavia. These countries in common with China have the same underlying socialist legal philosophy in abolishing distinctions between out of wedlock and in wedlock children (Meijer, page 71). Matter of K, 8 I&N Dec. 73, dealt with an out of wedlock child born in Poland in 1939. The petitioner father, like the petitioner in this case, was unable to marry the child's mother because of "some family misunderstanding".

No birth certificate was submitted for the child, born in 1939, but petitioner presented a baptismal certificate made some nine years after the child's birth based on a statement affirming paternity by the petitioner. The Board traced the development of various legal statutes concerning out of wedlock children in Poland, beginning with the 1946 Law of Domestic Relations of Poland which abandoned traditional differences between legitimate and

illegitimate children, replacing them with a new distinction of children born in and out of wedlock. That statute, observed the Board, made clear that "any kind of discrimination against a child born out of wedlock would be abrogated with retroactive effect" and that under the 1946 Polish Law, an out of wedlock child "acknowledged by the father shall have the legal status of a child born in wedlock". By 1950 Poland had adopted a new Code of Domestic Relations, which "abolished all distinction between the legal status of a child born of legally married parents and that of a child born out of wedlock". The 1950 Polish statute expressly required the establishment of paternity by a court or by the father's acknowledgment through the Registrar of Births before parental rights from the father attaches. The baptismal certificate did not meet either one of these requirements. Nevertheless, the Board liberally construed the statute in favor of the petitioning father. After finding that the petitioner "had stated that he is the natural father of the beneficiary", and after noting that "the primary evidence of acknowledgment in a form of a certificate issued by the Registrar of Births was lacking", the delayed certificate of birth and baptism was regarded as "satisfactory secondary evidence", according to the Board, which rendered legitimate this child so acknowledged by his natural father (page 77). See also Matter of Chojnowski, 11 I&N Dec. 287.

In Matter of G, 9 I&N, page 518, petitioner, a native of Hungary, petitioned for his eight year old child born out of wedlock in 1953. The 1947 Law of Hungary abolished the distinction between legitimacy and illegitimacy and "provided the same status for children born out of wedlock as children enjoy who were born of parents legally married". By 1953, the new Code of Domestic Relations removed even this last discriminating mark by dispensing with the terminology of in wedlock and out of wedlock. Since 1953, the Board said "there are no legitimate or illegitimate children in Hungary anymore, only children of equal status". Since the father acknowledged his paternity of the child the Board held that the child "satisfies the requirement of legitimation under Hungarian Law and also satisfies the immigration requirements for legitimation (page 520). In Matter of Jancar, 11 I&N Dec. 365, the beneficiary was the unmarried illegitimate daughter of the petitioner born in Yugoslavia in 1944. The birth certificate only showed the name of beneficiary's mother and bore a notation that the father some five months later signed a statement at the local Youth Center that he was the child's father.

The issue faced by the Board was whether under Yugoslav law the act of acknowledging paternity legitimated the beneficiary. The new socialist system in Yugoslavia commencing with the 1946

constitution and the subsequent 1963 law specified that "children born out of wedlock are considered equal to those born in wedlock with respect to their rights and duties towards their parents and rights and duties of the parents towards them" and that the terms "legitimate" and "illegitimate" are no longer used in domestic relations legislation. The problem here was that the act of acknowledgment was made before the enactment of any of the Yugoslavian laws equalizing the status of in and out of wedlock children and the Board was unable to find any cases on how the Yugoslav courts would interpret an acknowledgment which had no legal significance in the pre-Communist Yugoslavia of 1944. Nevertheless the Board liberally adapted the Yugoslav law currently in force and held the acknowledgment of paternity, though not strictly in compliance with the law, was sufficient to hold that the beneficiary was a "legitimate child".

It is axiomatic that "the policy of our laws has always been to encourage family relationships even those foster in character" Woodward v United States, 341 US 112,113 (1951). The encouragement of family relationships in immigration proceedings is doubly important because in the enactment of the Immigration Reform Act of 1965, Congress recognized that "reunification of families is to be of the foremost consideration" (Senate Report

No. 748, 89th Congress, 1st Session, page 13).

Given this clear Congressional mandate to interpret the law liberally and humanely to reunite families, and in view of its past liberal interpretation of the legitimacy statutes of Panama, Yugoslavia, Hungary and Poland, the hostile, strained and restrictive interpretation of the legitimacy statute of China by the Board is an irrational and inexplicable departure from established standards of the type denounced by Judge Edelstein as "overzealous" and "consistently wrong" (Andrade v Esperdy, 270 F. Supp. 516, at page 520).

The Court should direct that the petition be granted on the ground that under the applicable Chinese law the beneficiary is the legitimate son of the petitioner.*

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* New York General Construction Law §59, added in 1925, provides that "child born out of wedlock" shall thereafter be used in local legislation or public or judicial proceedings in place of "bastard" or "illegitimate child". See generally Schatkin, "Disputed Paternity Proceedings" (3rd ed. 1953) on the situation of the natural child (pp. 3-44).

II

The statutory denial of benefits to a resident alien natural father which are granted to the natural mother is unconstitutional.*

Section 203(a)(2) of the 1952 Act grants a second preference to immigrant quota visas to unmarried sons and daughters of alien residents.

In the ordinary meaning of the statutory words Kim Kok Lau is the "unmarried son" of petitioner. Thus on the face of the statute this Court could order grant of the petition on that ground. But the Immigration Service and the Board of Immigration Appeals, with judicial approval at least in respect of adopted sons and daughters not here involved (Nazanero v Attorney General 512 F 2936 C.A.D.C.)), have taken the view that the parent - son relationship must fit within the definitions of parent - child in §101(b)(2) which include subdivision (D) restricting to the natural mother petitions for children born out of wedlock.

Two recent lines of Supreme Court decisions require judicial condemnation of the statutory provision which provides for

* After this brief was drafted on this question of first impression a three Judge District Court for the Eastern District of New York decided that the statutory discrimination is constitutional, Fiallo v Levi 74 C 1083, decided November 28, 1975. The opinion of the Court and the dissenting opinion are discussed below p. 29, after first discussing the applicable U.S. Supreme Court decisions relied on in part in the dissenting opinion in Fiallo.

approval of the petition of a natural mother for preference status of a son or daughter born out of wedlock but excludes approval of such a petition by a natural father of such a son or daughter.

In Weinberger v Wiesenfeld 420 US 636 (decided March 19,1975) the Court held unconstitutional the statutory denial of social security benefits to a widower of an insured or covered individual, his wife a school teacher, who died in child birth, which are given to a widow of a covered individual. The widower applied for and received monthly benefits for the surviving child but was advised that the statute did not give a widower the benefits given to a widow. The Court's opinion (Brennan, J.) states that the gender-based discrimination is irrational in a statute designed to allow the surviving parent to remain at home to care for a child. The two concurring opinions (Powell and Rehnquist, J.J.) agreed. There was no dissent.

In Frontiero v Richardson 411 US 677 (1973) the Court held unconstitutional a statutory provision denying to a military servicewoman allowances for a husband given to a serviceman for his wife as a dependent without proof of actual dependency. Plaintiff, a lieutenant in the Air Force sought housing and medical benefits for her husband, which were denied. Mr. Justice Brennan's opinion (Douglas, White and Marshall) states that

classifications based on sex "are inherently suspect and must therefore be subjected to close judicial scrutiny". No acceptable justification of the discrimination was submitted by the Government.

Justice Stewart concurred separately on the basis of the Court's unanimous decision in Reed v Reed 404 US 71 and Justice Powell (the Chief Justice and Justice Blackmun) concurred separately on the basis of Reed but refused to accept the view that sex, like race, is an inherently suspect classification. Mr. Justice Rehnquist dissented for the reasons stated in the District Court's opinion, 341 FSup 201.

In Reed v Reed supra Chief Justice Burger in an opinion for the unanimous Court held unconstitutional a provision of the Idaho Probate Code that "males must be preferred to females" in appointing an administrator of an estate from the classes of eligible persons. One class is mother and father and the father of a deceased adopted son was chosen over the mother living apart from the father. The Court stated there was no justification for this discrimination based on sex.

In addition to these recent decisions condemning statutory discrimination in favor of one parent or spouse over the other in conferring governmental benefits there is an additional line of

decisions rejecting discrimination against illegitimate children.

In Jimenez v Weinberger 417 US 628(1974) the Court (Burger Ch.J. for eight members of the Court)held unconstitutional as a denial of equal protection the Social Security Act provisions which allow some illegitimate children to share with legitimate children the benefits based on disability of a parent but exclude illegitimate children born after the disability and therefore not acknowledged or affirmed through evidence of domicil or support before disability. Apparently the discrimination was an effort to prevent spurious claims. But the Court pointed out that the potential for spurious claims was as great with respect to the subclass of illegitimate children granted benefits as those denied benefits: "...hence to deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment." The Court remanded the case to allow the excluded children an opportunity to establish their relationship as children.

In Weber v Aetna Casualty & Surety Co. 406 US 164(1972) the Court held unconstitutional the Louisiana statute which gave all the workman's compensation of a father who died as a result of injuries suffered in employment to his legitimate minor children and excluded his unacknowledged two minor illegitimate children,

one born posthumously. The Court concluded that the "Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where - as in this case - the classification is justified by no legitimate state interest, compelling or otherwise." The Court relied on its prior decision in Levy v Louisiana 391 US 68(1968) holding unconstitutional a Louisiana statute barring an illegitimate child from recovery for the wrongful death of a mother.

Stanley v Illinois 405 US 645(1971) is another pertinent decision in which statute was held to deny equal protection to an unwed father by granting other parents, including an unwed mother, but not him a hearing before removing a child from his custody.

The application of these cases to the present situation in which the statute grants a benefit to an unwed mother but not to an unwed father is evident. The natural mother can petition to have her son or daughter granted a preference status so that an immigrant visa may be obtained and the parent and son or daughter be reunited in the United States - a benefit of no small value. But the natural father is categorically denied that benefit without even questioning the fact of the biological relationship of father and son or daughter. The biological relationship is not questioned here and yet the statute commands denial of the father's

petition for a son if not deemed "legitimate". Refusal to recognize the relationship of natural father and son, or permit proof if the relationship is questioned, establishes a conclusive presumption which denies both due process and equal protection within these cited authorities.

The Government might suggest here, as it did unsuccessfully in Jiminez supra, that the statutory discrimination is justified by the governmental interest in avoiding spurious claims of parenthood by alleged fathers. But women equally might make such spurious claims. The Government properly guards against false claims by requiring proof of the relationship in those cases where there is any question about it including significantly support of the minor child by the alleged parent and other facts. That proof may be required whether the alleged parent is mother or father. But the requirement of proof in proper cases is no reason to deny a putative father the opportunity to present proof by a statutory provision in effect denying the inescapable biological fact that illegitimate children have fathers as well as mothers.

The absolute bar of a petition by a natural father is not justified by the argument that fatherhood is more difficult to prove than motherhood because of the mother's more obvious physical relationship to the child during pregnancy. But in order to establish the father's responsibility for support the science

of serology and the law of affiliation have been vigorously developed. The courts generally recognize that fatherhood may be established for this purpose.* Equally the natural father's rights as well as his responsibilities should be protected. Stanley v Illinois supra. Applicable constitutional law has developed beyond the point where it can any longer be said that rights of all natural fathers may be denied simply because of difficulty of proof of fatherhood in some cases. In fact support of a child from birth as in this case is the strongest practical proof of fatherhood.

It is submitted that the statutory provisions denying petitioner natural father the benefit granted to a natural mother is unconstitutional and the requested preference status should be granted.

* In New York the Family Court has exclusive original jurisdiction to establish paternity. Family Court Act Sections 511ff. Section 532 provides for blood grouping tests. The Uniform Support of Dependents Act, a nationwide system of enforcing support of dependent children, is contained in Chapter 3A of the Domestic Relations Law §§30-43. Trent v Loru 57 Misc.2d 382,292 N.Y.S. 2d524(1968)

On November 28, 1975 after the above brief was drafted, a three Judge District Court for the Eastern District of New York in Fiallo et al v Levi et al decided that the statutory discrimination against alien resident fathers of children abroad born out of wedlock is constitutional. In the Court's opinion (Moore C.J. - Bramwell, D.J. concurring) (1) the problem of proof and sham claims justifies exclusion of natural fathers from the parent - child relationship; (2) Congress could reasonably decide, on balance, that unwed fathers would not have the relationship with their natural children warranting including them in the statutory family reunion policy and (3) that a parent's privilege of bringing a child to reside with him here is a statutory privilege not constitutionally protected.

The dissenting opinion (Weinstein, J.) points out (1) that excluding natural fathers but not natural mothers is not rationally related to excluding sham claims (Jiminez v Weinberger supra); and (2) that this discrimination, as much as a provision excluding immigration of all black aliens, is a suspect discrimination based on sex not supported by an overriding government necessity and is unconstitutional. It is submitted that the power of Congress to regulate immigration, like all its other powers, is subject to the due process and equal protection requirements of the due process clause of the Fifth Amendment.

This constitutional responsibility is not avoided by the circumstance that the unmarried son affected by this discrimination is an alien abroad without constitutional rights. The constitutional right being asserted is that of the resident alien father to have his unmarried son join him in the United States under laws equally applied and without discrimination based on sex.

Conclusion

Judgment should be granted in favor of plaintiff that his petition for a preference visa status for his natural son should be approved on the ground (I) the son is legitimate or, in the alternative (II) that equal protection of the law requires that the natural father be given the same statutory benefit of a preference visa status which is given to a natural mother.

Respectfully submitted,

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New York, New York 10038
BE 3-1088

December 11, 1975

Attorneys for Plaintiff

THE:ml
75-0907

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

CHIN LAU,

Plaintiff,

- v -

MAURICE F. KILEY, District Director of the New York District Immigration and Naturalization Service, United States Department of Justice,

Defendant.

75 Civ. 1237 (LFM)

- x

REPLY BRIEF TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

THOMAS J. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

THOMAS H. BELOTE,
Special Assistant United States Attorney,
Of Counsel.

This memorandum is submitted in opposition to plaintiff's motion herein. It further supplements the memorandum in support of the Government's motion for summary judgment, previously filed herein.

Plaintiff seeks a declaratory judgment against the defendant alleging that error was committed when the plaintiff's visa petition beneficiary was found statutorily ineligible for a preferred status under Section 203(a)(2) of the Immigration and Nationality Act, 8 U.S.C. §1153(a)(2).

The Government maintains that the administrative decisions below were correct and that the visa petition beneficiary is statutorily ineligible for the requested preference. The Government opposes the plaintiff's motion, and respectfully requests that the action be dismissed rather than remanded for a determination as to the actual existence of the claimed familial relationship. Because the administrative petition below was denied solely on the basis of statutory eligibility this required factual determination has never been reached by the Immigration and Naturalization Service or the Board of Immigration Appeals.

THE FINDINGS OF THE BOARD OF IMMIGRATION APPEALS WITH RESPECT TO THE ISSUE OF LEGITIMACY UNDER ARTICLE 15 OF THE MARRIAGE LAW OF THE PEOPLE'S REPUBLIC OF CHINA ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND ENTITLED TO AFFIRMANCE BY THIS COURT

A. The Provisions of the Immigration and Nationality Act Relating to the Admission of Aliens are Restrictive in Nature.

The plaintiff argues that the decision of the Board of Immigration Appeals denying the requested preference status is contrary to the general policy of the Immigration and Nationality Act (the "Act") which encourages reunification of certain family relationships in immigration proceedings. With respect to the immigration proceedings involved in this action the plaintiff has overstated this argument. Certainly the policy behind the statutory enactment of the various immigration provisions was benevolent in nature, however, the specific statutory provisions relating to the admission of various classes of prospective immigrants are clearly and unambiguously restrictive in nature. For example, Section 101(b)(1)

of the Act specifies a limited class of familial relationships that will provide the basis upon which a preference status for admission to the United States will be granted by the Attorney General.

Further, recognizing the restrictive nature of the immigration laws the Courts have consistently upheld the right of the Attorney General, pursuant to his Congressionally delegated authority, to apply a "federal standard" with respect to the type of familial relationship which might permit an alien to qualify for entrance into the United States. United States v. Diego, 320 F.2d 898, 905 (2nd Cir. 1963); see also, Lutwak et al v. United States, 344 U.S. 604 (1953); Nazarene v. Attorney General, 512 F.2d 936 (D.C. Cir.), cert. denied U.S. (1975). Therefore, despite the benevolent policy behind the statutory provisions, including Section 203(a)(2) of the Act, the plaintiff must demonstrate that his alleged adult son is a relative who qualifies for the preference status under the restrictive provisions of Section 101(b)(1) of the Act. Failing to prove this

qualification an alien cannot be granted preferred status and must enter the United States without preference and on an equal basis with other prospective immigrants. The Board of Immigration Appeals properly determined that the plaintiff failed to sustain his burden of proof to qualify for the requested preference status. Section 291 of the Act, 8 U.S.C. §1361.

In view of the restrictive nature of the Act the plaintiff's argument, exemplified in his hypothetical example of the "promiscuous mother" (plaintiff's brief, p. 11) is particularly unpersuasive. If paternity cannot be "legally established" under Article 15 of the Marriage Law of the People's Republic of China, and if the claimed father cannot be compelled to support that child, neither that child nor his alleged father should be able to utilize this alleged relationship many years after the birth of that child to qualify for an immigration preference under Section 203(a)(2) of the Act. While Congress enacted ameliorative provisions whereby the same child could obtain benefits from the natural mother, Section 101(b)(1)(D) of

the Act, it specifically limited these children born out of wedlock and seeking immigration benefits through their fathers to a narrow class. See §101(b)(1)(c) of the Act.

B. The Board of Immigration Appeals Properly Determined that the Plaintiff's Alleged Son was not a Child within the Meaning of Section 101(b)(1) of the Act.

The plaintiff, twenty three years after the birth of his alleged son, now complains that Article 15 of the Marriage Law alleviates him from demonstrating the son's legitimacy other than by the submission of certain unverified documents which accompanied the filing of his administrative petition. In support of his position he charges that the Board's decision evidences a pre-determined effort to bar Chinese children, born out of wedlock, from obtaining a preferred status under the immigration laws. It is submitted that his analysis of past administrative decisions is incorrect. In accordance with the restrictive nature of the Act a strict reliance on the letter of domiciliary law has consistently characterized

the decisions of the Board of Immigration Appeals, sometimes to the disadvantage of a foreign born child, and sometimes to his advantage*. See Peignand v. Immigration and Naturalization Service, 440 F.2d 757, 760 (1st Cir. 1971) (relating to an anologous provision on the Act); Matter of Doble-Pena, Interim Decision #2000 (decided by the B.I.A., August 15, 1969). Contrary to the plaintiff's contention this strict interpretation, and not a predetermined or biased decision, is evident in the Board's decision below.

The plaintiff also charges that it is not necessary to legally establish paternity under Article 15

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*Parenthetically, although the administrative decisions relating to legitimacy under the domestic laws of other nations are irrelevant to the issue of legitimacy in the People's Republic of China, the Board has consistently required some formal documentation relating to legitimation in its decisions. In this respect it should be noted that the visa petition beneficiary has failed to obtain any form of documentation relating to legitimacy from the government of the People's Republic of China. In addition, the plaintiff has failed to obtain similar official documentation, e.g., birth certificate, which is apparently available from the People's Courts of that government. (See attached memorandum addressed to the Immigration and Naturalization Service dated May 1, 1974).

of the Marriage Law in order to obtain the benefits of Section 203(a)(2) of the Act. In support of that interpretation he relies solely on one portion of Article 15, and extensively on the writing of one author as evidence that his analysis of Chinese law is correct. It is respectfully submitted that neither the language contained in the Chinese code or the analysis of M.I. Meijer, Marriage Law and Policy in the Chinese People's Republic (1971) contradicts the determination by the Board of Immigration Appeals that paternity must be "legally established" in order that a visa petition beneficiary might qualify as a "child" for immigration purposes. Further, it is only by such a construction that the preference system contained in Section 203(a)(2) can be immunized from the vagaries and whimsical political change which Meijer described as underlying the Marriage Law of the People's Republic of China. Meijer, supra at 78-82.

CONCLUSION

It is respectfully submitted that the Board was correct in finding that the visa petition beneficiary

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was statutorily ineligible for the requested preferred status under Section 101(b)(1) of the Act and that the administrative application should not be remanded to the agency for fact findings by the Attorney General as to the actual existence of the alleged familial relationship. The defendant requests that this action be dismissed.

Dated: New York, New York

January 5, 1975.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

THOMAS H. BELOTE,
Special Assistant United States Attorney,
Of Counsel.

Mr. Edward F. O'Connor
Associate Commissioner
Examinations
Immigration and Naturalization
Service
Department of Justice
Washington, D. C. 20536

MAY 1 1974

Dear Mr. O'Connor:

I refer to your letter of March 27, 1974 concerning the availability of civil documents on the Chinese Mainland, your file number CO 204.21-C.

According to the latest information from our Liaison Office at Peking (USLO), the People's Courts at district and city levels in the People's Republic of China are prepared to issue documents attesting to such matters as birth, marriage and family relationship. The signature of the local official is then authenticated by an official of the consular department of the Ministry of Foreign Affairs of the PRC and that official's signature is authenticated by an official of USLO. Persons residing in the PRC may apply for these documents on behalf of individuals residing elsewhere, or persons outside the PRC may write directly to the appropriate district court. A fee of $2.50 must accompany the request.

The Department has asked our Liaison Office at Peking for additional information concerning the documents and when this information is received, you will be advised and Appendix B, Volume 9 of the Foreign Affairs Manual will be amended accordingly.

Sincerely yours,

John R. Diggins, Jr.
Director
Visa Office

A 177

CDScully 2/13/75

NJKrieg

Availability of Civil Documents - People's Republic of China

Please amend 9 FAM Appendix B - China Republic of Taiwan and add section for China, People's Republic.

Amend CHINA, Republic of (Taiwan) at top right hand corner of TL 758 and top left hand corner on back up page to read: CHINA

Delete China, Republic of (Taiwan) in middle of page and make new entry at top left hand corner of TL 758 as follows:

Under China (Taiwan) at end of first right hand paragraph delete the words "See Note 2" and insert "see China Peoples Republic".

On back up page delete the words "Note 2".

CHINA, Republic of (Taiwan)
on back of page - top left hand corner make entry

CHINA, People's Republic (Peking)
and add the following information on the reverse back up page:

CHINA, People's Republic of

POLICE RECORD: UNAVAILABLE

PRISON RECORD: UNAVAILABLE

MILITARY RECORD: UNAVAILABLE

BIRTH, MARRIAGE, DIVORCE AND DEATH CERTIFICATES: Available

The People's Courts at district and city level in the People's Republic of China are prepared to issue documents attesting to such matters as birth, marriage and family relationship. The fee is Yuan 5 (approximately U.S. $2.50). The signature of the local official is authenticated by an official of the Consular Department of the Ministry of Foreign Affairs.

NOTES: Documents may be applied for by persons residing in the PRC, or by or on behalf of individuals residing elsewhere. Persons residing outside the PRC may write directly to the appropriate district court. The fee should accompany the original request.

Persons who have not resided in the PRC since 1950 may encounter difficulty in obtaining documents unless they have close relatives or friends in the PRC. While PRC authorities have indicated that documents are available for any time period, they have noted that documents will be issued based on investigation and evidence available at the time of application.

Consular Officer at his discretion may take into consideration the availability of more easily obtained secondary evidence, as well as the provisions of 22 CFR 42.111(c), in those cases wherein the applicant claims he has been unable to obtain a document.

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V 10 Availability PRC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHIN LAU,

Plaintiff

75 Civ. 1237

- v -

MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice,

Defendant

REPLY BRIEF

1. Defendant misconceives plaintiff's position concerning the legal status of his out of wedlock son. He does not claim, as defendant asserts (Gov't. Br. p. 31), that his son was "legitimated" under 8 U.S.C. Section 1101(b)(1)(C). Rather, it is clearly and unambiguously stated in the first point of plaintiff's brief (p. 8) that under Article 15 of the Marriage Law of the People's Republic of China the beneficiary was his "legitimate son at birth". Being legitimate at birth the beneficiary is a "legitimate child" under Subsection (A) of 8 U.S.C. Section 1101(b)(1) because the status of being legitimate at birth is determined by the law of the place of the child's birth (Matter of Kwan, 13

I & N Dec. 302, 305).

Article 15 of the Chinese Marriage Law does not provide for any procedure similar to the Western-type of legitimation proceedings. Such a procedure is plainly not necessary because the equality of status of out of wedlock children with that of in wedlock children is clearly and unconditionally mandated by the statute's first paragraph and both are legitimate at birth (Meijer, Marriage Law and Policy in the Chinese People's Republic, pages 73, 208, 227).

The Library of Congress opinion authored by Mr. Hsia dated August 7, 1975, despite some imprecise language betraying a confusion between the question of legitimacy at birth and subsequent legitimacy through a legal process of legitimation, upholds rather than rebuts plaintiff's contention that the beneficiary is a legitimate son at birth.

Answering government counsel's misstated issue concerning the procedure "to legitimate a child", Mr. Hsia states that he was unable to find any defined procedure either for "establishment of paternity" or for "legitimation". He affirms that the "rights of children born in and out of wedlock are identical" and concludes that the status of a legitimated child" as a halfway house between illegitimacy

and the status of a legitimate child born in wedlock probably would not exist" in the People's Republic of China.

Further confirmation that no legitimation proceedings are required for out of wedlock children in China due to the fact that Article 15 unconditionally grants them the status of a legitimate child at birth is found in Mr. Hsia's responses (page 3) to the Government's question as to whether there were any "discrepancies" between the rights of a child born in and out of wedlock. Concluding there was no discrepancy, Mr. Hsia says their status of "absolute equality contained in the 1950 Marriage Law must be taken quite literally." With respect to the very vital question of rights of inheritance between in and out of wedlock children, Mr. Hsia is of the opinion that "the right of a child born out of wedlock to be an heir is so identical to the right of a child born in wedlock that consideration by the court is unnecessary. In other words, the identity of the rights of these two types of children is such that it is apparently not subject to question or qualification by the court." He concluded unequivocally that other sources "affirmed the identity of the rights of children born in

and out of wedlock".*

2. In an attempt to justify the glaringly disparate liberal treatment accorded by the Board of Immigration Appeals to out of wedlock children coming from other countries and the unwarranted illiberal treatment of Chinese children, the government claims such action is necessary on the grounds that China is a country which issues no contemporaneous birth certificates, whereas other countries have birth certificates which allow for some identity of paternity. One example cited was Matter of K- , 8 I & N 73, which defendant claims paternity was acknowledged on a certificate of birth and baptism. The government neglects to mention that this case involved the child born without a contemporaneous certificate of birth. The certificate of birth was based on a baptismal certificate obtained by the father issued some 9 years after the birth

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* The litmus test of the total equality in legal status between in and out of wedlock children is whether they are equally treated in matters of inheritance. Prior to Jimenez v. Weinberger, 417 U.S. 628 (1974) and Weber v. Aetna Casualty and Surety Company, 406 U.S. 164 (1972), the Supreme Court by a bare majority of 5-4 in Labine v. Vincent, 402 U.S. 990 (1971) upheld a Louisiana statute denying illegitimate children the benefit of intestate succession to property which was available to legitimate children.

of the child. Moreover, at the time of the child's birth, the Polish law did not equalize the status of an in wedlock and out of wedlock child and the prescribed acknowledgment of paternity required by the subsequent Polish statute was not complied with, but, nevertheless, the Board liberally construed the statute retroactively in favor of the petitioning father. The government makes no effort to explain the favorable treatment accorded to out of wedlock Panamanian children in the Matter of Sinclair, 13 I & N Dec. 613, 614 and the unfavorable treatment of Chinese children of the same category when the law of both countries granting equality between in and out of wedlock children are substantially similar.

3. Whenever a particular ruling of the Immigration Service is questioned, the government invariably asserts in defense that such ruling is justified in order to prevent fraud and to avoid an intolerable burden on the administration of the immigration laws. This argument was characterized in Lee Fook Chuey v. Immigration and Naturalization Service, 439 F. 2d 244 (C.A. 9, 1971) as "a specter of possible 'horribles' " (at page 249) and a position which

was "possibly less than tenable and certainly less than candid"(at page 251).

The fact that China is a country with no birth certificates does not mean that the government is without any means for detecting spurious claims of filiation.* First, the burden of proving filiation is on the petitioner (Matter of Brantigan, 11 I & N Dec. 493 (B.I.A. 1966). Secondly, another adequate safeguard against fraud is in requiring proof of relationship in the form of pedigree affidavits, blood tests, together with indisputable documentary evidence, as submitted in this case, establishing relationship such as old family album photographs, proof of support, old letters, etc. (Matter of Chin, Interim Dec. 2151). A claim of "administrative convenience" is a transparently insufficient basis for a palpably erroneous misreading of the law, especially when "invidious discrimination results" (dissenting opinion of Judge Weinstein in Fiallo v. Levi, et al. (Nov. 1975)).

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* Other countries as well as China, which do not issue birth certificates include Afghanistan, Albania, Burma, Iran, Irac (prior to 1921), Nepal, Oman, and Saudi Arabia. In such cases American Consuls are instructed to accept substitute evidence. See Appendix B, PART IV FOREIGN AFFAIRS MANUAL.

4. Finally, it is difficult to conceive how the first paragraph of Article 15 could be more explicit in unconditionally granting legitimate at birth status to out of wedlock children. A similar provision in the Panamanian Law in Matter of Sinclair was held by the Board to have "abolished the old distinctions between legitimacy and illegitimacy by providing for equal treatment of all children" as to render them "legitimate" children under the immigration law.

The second paragraph concerning "establishment of paternity" was inserted not to qualify or diminish any rights of an out of wedlock child, but, on the contrary, to give him additional protection in the form of a paternity suit against his father for support and maintenance, (Meijer, page 208). The labored, artificial and distorted reading of this second paragraph by the Board for the purpose of devising some vague, formless and undescribed Aesopian procedure of letitimation which - by its very lack of specificity - is impossible of compliance, invites a suspicion that it was motivated by invidious discrimination. The overriding purpose of Article 15 was to remove the unfair stigma of illegitimacy and the loss of rights from an

out of wedlock child and to prohibit discrimination between children based on the lack of marriage of their parents as such children "are not responsible for the mistakes of their parents" (Meijer, page 208)* and it should be so read as to confirm legitimate status on the beneficiary.

Respectfully submitted,

BENJAMIN GIM
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* Compassion for out of wedlock children is by no means confined to socialist countries. In Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 Justice Powell on page 175 said: "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong doing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as an unjust - way of deterring the parent."

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U.S. DISTRICT COURT FILED MAR 25 1975 S.D.N.Y.

Mr. Belote
75-0907

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHIN LAU,

Plaintiff,

-against-

MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice,

Defendant.

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75 Civ. 1237-LFM

OPINION

#4/4/118

APPEARANCES:

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-and-
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by: Thomas H. Belote, Esq.
Special Asst. U.S. Atty.
Attorney for Defendant

MacMAHON, District Judge.

Defendant moves, and plaintiff cross-moves, for summary judgment, pursuant to Rule 56, Fed.R.Civ.P., in this action for a declaratory judgment. The facts narrated below have been stipulated. The action is, therefore, ripe for summary judgment.

Plaintiff, Chin Lau,[1] filed a petition with the New York district director of the Immigration and Naturalization Service ("INS"), pursuant to Section 204 of the Immigration and Nationality Act (the "Act"),[2] for a visa granting a preference status to Kin Kok Lau, as his alleged unmarried son, under Section 203(a)(2) of the Act.[3]

The petition alleged that, while residing in China, Chin Lau cohabited with, but never married, a woman named Chung Dung You. Allegedly, Kin Kok Lau was born from this relationship on June 16, 1952, in Hoksan, Kwongtung, People's Republic of China. Plaintiff submitted evidence to INS to substantiate his claim that Kin Kok Lau is entitled to a visa preference as his unmarried son.

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The district director denied the petition on February 28, 1974 on the ground that Kin Kok Lau was statutorily ineligible for a preference because he was illegitimate at birth and was never legitimated thereafter.

Plaintiff appealed to the Board of Immigration Appeals (the "Board"). The Board dismissed the appeal on October 23, 1974, holding that:

(1) in order to qualify as a "son" for preference under Section 203(a)(2) of the Act, the beneficiary of the visa petition must once have qualified as a "child" of petitioner under Section 101(b)(1) of the Act[4] and that the burden of establishing the existence of that relationship rests upon petitioner;

(2) there was no evidence to indicate that the paternity of Kin Kok Lau was ever "legally established" under Article 15 of the Marriage Law of the People's Republic of China and that, therefore, he was not the legitimate or legitimated son of petitioner under the law of the child's domicile; and

(3) in the absence of such evidence, Kin Kok Lau did not qualify for a preference under Section

203(a)(2) of the Act.

Plaintiff now seeks a declaratory judgment that the Board erred as a matter of law in denying plaintiff's petition. In the alternative, plaintiff claims that Section 101(b)(1)(D) of the Act[5] violates the equal protection guarantee of the Fifth Amendment in that it permits an illegitimate child to obtain a visa preference through his relationship to his natural mother, but not through his relationship to his natural father.

Section 203(a)(2) of the Act grants a preference status to the "unmarried sons or unmarried daughters of an alien lawfully admitted for permanent residence." Such a preference gives the beneficiary a priority for consideration by a United States Consulate for the issuance of an immigrant visa ahead of other similarly situated aliens.

In order to qualify for a preference as a "son" under Section 203(a)(2), the beneficiary must have once qualified as the "child" of the petitioner, as defined in Section 101(b)(1),[6] which provides, in pertinent part:

> "The term 'child' means an unmarried person under twenty-one years of age who is--
>
> (A) a legitimate child; or
>
> * * *
>
> (C) a child legitimated under the law of the child's residence or domicile . . . if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.
>
> (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother."

Determination of an individual's legitimacy or illegitimacy is governed by the applicable law at the time and place of his birth.[7] The pertinent law here is Article 15 of the Marriage Law of the People's Republic of China, which provides:

> "Children born out of wedlock enjoy the same rights as children born in lawful wedlock. No person is allowed to harm them or discriminate against them.
>
> Where the paternity of a child born out of wedlock is legally

established by the mother of the child or by other witnesses or material evidence, the identified father must bear the whole or part of the cost of maintenance and education of the child until the age of eighteen.

With the consent of the mother, the natural father may have custody of the child.

With regard to the maintenance of a child born out of wedlock, if its mother marries, the provisions of Article 22 apply."8

The Board found that Kin Kok Lau's paternity was never "legally established," in accordance with the second paragraph of Article 15, and, therefore, he could not be petitioner's legitimate son. The Board, therefore, never reached the question of whether plaintiff was in fact Kin Kok Lau's natural father.

Plaintiff contends that all children born in China are considered "legitimate" because all have the same rights and obligations under the first paragraph of Article 15.

We deal here with a legal system substantially different from our own.[9] Many, if not most,

legal disputes are handled not in an adversary proceeding, with attorneys and judges, but by negotiation in village tribunals or local committees. Decisions are not published in any reporting system, and few outsiders have been permitted to observe any legal proceeding. Thus, we are largely operating in the dark in attempting to construe Article 15.

M. J. Meijer, in his book, "Marriage Law and Policy in the Chinese People's Republic,"[10] states that:

> "Article 15 provides expressly that illegitimate children shall enjoy the same rights as those born in wedlock, which means that they have the right to be brought up and educated and the right to inherit from both parents, plus, of course, the corresponding duty to support the parents."11

Plaintiff asserts that Kin Kok Lau is considered legitimate under Chinese law because, with respect to Chin Lau, he has all rights of a child born in wedlock.

According to Meijer, the second paragraph of Article 15 retains "the institution of the paternity

suit in [the] case of illegitimate children."[12] The Board seized upon this provision, holding that, since plaintiff was never subjected to such a suit, his paternity was never "legally established."

The Board took the same position in Matter of Lo, Interim Decision #2209 (June 6, 1973), on substantially the same facts. There, however, the Board added:

> "[W]e do not reach the question of whether legally establishing paternity pursuant to Article 15 is tantamount to legitimation for immigration purposes. . . ."

Thus, the Board itself recognizes that there may be a difference between establishing paternity under the second paragraph of Article 15 and the legitimation of a child born out of wedlock.[13]

In our view, the second paragraph of Article 15 retains a paternity suit, which will be used, as in this country, only when the putative father denies the relationship. The Board erred, therefore, in finding that such a procedure is necessary to determine the legitimacy of a child born out of wedlock.

We do not, however, accept plaintiff's position that the first paragraph of Article 15 makes all children legitimate for immigration purposes. We note that Chinese law still draws at least a semantic distinction between "children born out of wedlock" and "children born in lawful wedlock." It would have been far simpler, if no distinction were intended, to state that all children are considered legitimate.[14] Apparently, however, there are no provisions in Chinese law, insofar as we have been informed, prescribing the method for "legitimation" of children born out of wedlock.[15]

We are thus confronted with an unique situation, since it appears that the terms "legitimate child" and "illegitimate child" are meaningless in the context of the Chinese legal system. The present controversy, therefore, can only be resolved by turning to the underyling policy of our immigration laws.

The reason for the distinction between legitimate and illegitimate children, created in Section 101(b)(1) of the Act, is to assure the existence of a certain familiar relationship between the alien

and United States citizens or lawful resident aliens. The legislative history of the Act indicates that:

> "Under this system emphasis in the selection from among those eligible to be immigrants . . . will be based upon the existence of a close family relationship to U.S. citizens or lawful resident aliens regardless of the birthplace of the alien. Reunification of families is to be the foremost consideration."16

It is, therefore, obvious that preferences are not to be granted unless it is shown that a family relationship existed. Normally this is done by showing that the beneficiary is a legitimate or legitimated child. However, in the present context, where those terms are meaningless, it is disingenuous to insist on such a showing. Rather, it is sufficient if a petitioner is able to prove the existence of the requisite family relationship as a matter of fact.

Thus, if Chin Lau is indeed Kin Kok Lau's natural father, and if they treated each other as father and son, as shown by creditable evidence of whatever facts INS deems material, including, for example, that they lived together in the same household

for a substantial period of time and that Chin Lau contributed to Kin Kok Lau's upbringing, then there is no valid reason why the desired preference should be denied.

It is not our function to determine whether plaintiff and Kin Kok Lau ever stood in the relationship of parent and child. Nor do we specify the kind or amount of evidence which plaintiff must produce to establish his claim. The determination of the standards of proof and sufficiency of the evidence to establish the requisite relationship is properly the function of INS, and we, therefore, remand this matter to INS for further consideration.[17]

In light of the foregoing, it is unnecessary to pass upon plaintiff's constitutional claim.

Before closing, we wish to compliment both counsel for their extraordinarily able and lawyer-like presentation of this case. Their arguments were concise, cogent, well-written, and well-researched. Such exemplary work is all too rare in this court and has been of great assistance to us in deciding this elusive problem.

Accordingly, defendant's motion for summary judgment is denied. Plaintiff's cross-motion for summary judgment is granted to the extent that we direct that this matter be remanded to the Board for reconsideration of plaintiff's petition in accordance with the foregoing opinion.

Submit judgment within ten (10) days.

Dated: New York, N. Y.
March 25, 1976

LLOYD F. MacMAHON
United States District Judge

Chin Lau v. Kiley 75 Civ. 1237-LFM

FOOTNOTES

1

Chin Lau, a male native and citizen of China, residing in New York, first entered the United States as a lawful permanent resident alien on May 19, 1966.

2

8 U.S.C. § 1154.

3

8 U.S.C. 1153(a)(2). This section provides: "Visas shall next be made available . . . to qualified immigrants who are the spouses, unmarried sons or unmarried daughters of an alien lawfully admitted for permanent residence."

4

8 U.S.C. § 1101(b)(1).

5

8 U.S.C. § 1101(b)(1)(D).

6

Matter of Cohen, Interim Decision #2255 (Board of Immigration Appeals, Jan. 8, 1974).

7

Matter of Kwan, 13 I. & N. Dec. 302, 305 (Board of Immigration Appeals, 1969).

8

Foreign Language Press, Peking (1971). Article 22 provides that, if a divorced woman remarries and her new husband contributes toward the maintenance of her children, the father may reduce his contributions by a like amount.

9

See Fitzhugh, Red China 'Law' a Test for U.S. Lawyers, N.Y.L.J., Jan. 29, 1976, p. 1, col. 2, and Jan. 30, 1976, p. 1, col. 2.

10

Hong Kong University Press (1971), p. 73.

11

Mr. Meijer is somewhat inaccurate in that he refers to "illegitimate children," rather than "children born out of wedlock," as they are called in Article 15. This is not a case of semantic hair-splitting, since it is possible that an out-of-wedlock child could be considered legitimate. In fact, that is the very question to which we must address ourselves in this case.

12

Marriage Law and Policy in the Chinese People's Republic, Hong Kong University Press (1971), p. 208.

13

This distinction between establishing paternity and legitimation is not foreign to our laws. For example, in New York, a "paternity suit" relates to support and maintenance rights of a child. See Domestic Relations Law § 33 (McKinney 1964). Legitimation occurs by a wholly different process, namely, the marriage of the mother and father. See Domestic Relations Law § 24 (McKinney 1964).

14

See, e.g., Matter of G------, 9 I. & N. Dec. 518, 520 (Board of Immigration Appeals, 1961), where the Board stated that, since Hungarian law had dispensed altogether with the terms "born in wedlock" and "born out of wedlock," "there are no legitimate or illegitimate children in Hungary any more, only children of equal status."

15

Similarly, while the Chinese Marriage Law apparently recognizes adoption of children, no formal procedures are stated. According to Meijer, adoption requires only an agreement, written or oral, between the natural parents of the child and the adopting parents. Marriage Law and Policy in the Chinese People's Republic, supra, at p. 206.

16

S. Rep. No. 748, 89th Cong., 1st Sess., U.S. Code Cong. & Admin. News (1965), p. 3332.

17

Since the burden is on plaintiff to establish, to the satisfaction of INS, the facts warranting the desired preference, the probability of a rash of sham petitions seems minimal.

75-0907

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED 2 24 76

CHIN LAU,

Plaintiff

v

MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice,

Defendant

~~PROPOSED~~ ORDER RE SUMMARY JUDGMENT

75 Civ. 1237 (LFM)

Submitted 5/11/76

This cause came on to be heard before the Court on Defendant's motion for summary judgment and plaintiff's cross motion for summary judgment, both parties appearing by counsel, and the opinion of the Court dated March 25,1976 having been filed, it is hereby

Ordered and Adjudged that Defendant's motion for summary judgment be and the same hereby is denied, and it is further

Ordered and Adjudged that Plaintiff's cross motion for summary judgment is granted to the extent that this matter is remanded to the Board of Immigration Appeals for reconsideration of Plaintiff's petition in accordance with the Court's opinion herein.

Dated: ~~April~~ MAY 20 ,1976

1st Lloyd F. MacMahon
Lloyd F. MacMahon
United States District Judge

JUDGMENT ENTERED: 5-24-76
1st Raymond F. Burghardt
CLERK